CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC., PETITIONER,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,779

CIVIL.

D'OENCH, DUHME & CO., INC., A CORPORATION,
APPELLANT,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 5, 1940.

INDEX.

	Original	Print
Notice of Appeal	1	1
Docket Entry of filing of Notice of Appeal and mailing of copy to Counsel for Plaintiff	2	1
Bond on Appeal	3	2
Complaint	5	3
Plaintiff's Exhibit A, Promissory Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co. $5,000.00, January 1, 1933, Memorandum as to	6	4
Summons and Marshal's Return	8	4

	Original	Print
Answer	10	6
Reply filed; Motion of Defendant to strike Reply overruled; Cause submitted, November 20, 1939	15	9
Reply	16	10
Transcript of Testimony and Proceedings	18	11
Caption	18	11
Testimony for Plaintiff	19	12
Plaintiff's Exhibits	20	13
1, Promissory Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $5,000.00, January 1, 1933	21	13
2a and 2d, Application of Belleville Bank & Trust Co., to Federal Deposit Insurance Corporation for loan, April 2, 1938	24	15
3, Note executed by Belleville Bank & Trust Company to Federal Deposit Insurance Corporation, Memorandum as to	26	17
4, Page 0096 of Schedule B-7 relating to charged-off assets	28	18
5, Power of Attorney executed by Belleville Bank & Trust Co., to Federal Deposit Insurance Corporation, Memorandum as to	29	18
R. R. Banjan	29	19
W. J. Stapleton	52	33
Testimony for Defendant	55	35
Admission that Defendant is a corporation incorporated under laws of Missouri	55	35
Defendant's Exhibits	57	36
A, Receipt for Demand Note for $2,000.00, Belleville Bank & Trust Co., to D'Oench Duhme & Co., Inc	57	36
B, Receipt for Demand Note for $3,000.00, Belleville Bank & Trust Co., to D'Oench Duhme & Co., Inc	58	37
Louis H. Kreitmeyer	58	37
Herman Duhme	85	54
Further Testimony for Plaintiff	89	56
Plaintiff's Exhibit 6, Demand Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $3,000.00, August 1, 1926	90	57
Plaintiff's Exhibit 7, Demand Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $2,000.00, August 1, 1926	90	59
R. R. Banjan	91	61
W. J. Stapleton	95	63
Docket entry of filing of Findings of Fact and Conclusions of Law and Decree	100	65
Findings of Fact and Conclusions of Law, etc	101	66
Decree, January 8, 1940	108	72
Docket entry of filing of Motion of Defendant for new Trial	109	72
Motion of Defendant for new Trial	110	73
Docket entry of overruling of Motion for new Trial	112	74
Docket entry of filing of Additional Findings of Fact and Conclusions of Law	113	74
Additional Findings of Fact and Conclusions of Law	114	74
Motion for extension of time to file Transcript	115	75
Order extending time to file Transcript	117	76

	Original	Print
Stipulation as to record on Appeal	118	77
Stipulation for omission of certain matters from record on appeal	119	78
Clerk's Certificate to Transcript	122	80
Statement of Errors and Points relied upon	123	81
Proceedings in U. S. Circuit Court of Appeals	86	86
Appearance of Counsel for Appellant	86	86
Appearance of Counsel for Appellee	86	86
Order of Submission	87	86
Opinion, U. S. Circuit Court of Appeals	88	87
Judgment, U. S. Circuit Court of Appeals	97	94
Petition of Appellant for Rehearing	98	95
Order denying Petition of Appellant for a Rehearing	102	99
Clerk's Certificate to Transcript	103	99
Order allowing certiorari		100

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the November Term, 1940, of said Court, before the Honorable Archibald K. Gardner, the Honorable Joseph W. Woodrough and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the fifth day of July, A. D. 1940, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein D'Oench, Duhme & Co., Inc., a Corporation, was Appellant and the Federal Deposit Insurance Corporation, a Corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal to Circuit Court of Appeals.

(Filed April 6, 1940.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. #3

D'Oench, Duhme & Co., Inc., a corporation, Defendant.

Notice is hereby given that D'Oench, Duhme & Co., Inc., the defendant above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 8th day of January, 1940.

J. W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,

H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants,
D'Oench, Duhme & Co., Inc.

[fol. 2] (Docket Entry of Filing of Notice of Appeal and Mailing of Copy to Counsel for Plaintiff.)

April 6, 1940.

Defendants' notice of appeal to United States Circuit Court of Appeals, Eighth Circuit, from final judgment entered herein January 8, 1940, filed in duplicate and one copy thereof mailed by Clerk of the Court to Messrs. Leahy, Walther, Hecker and Ely, attorneys of record for plaintiff. Defendant's cost bond on appeal in the sum of $250.00 filed.

[fol. 3] Appeal Bond.

(Filed April 6, 1940.)

Know All Men By These Presents that D'Oench, Duhme & Co., Inc., of St. Louis, Missouri, a corporation, as Principal, and Herman Duhme of Clayton, Missouri, and Louis H. Krietmeyer of Richmond Heights, Missouri, as Sureties, are held and firmly bound unto Federal Deposit Insurance Corporation, the above named plaintiff, its successors and assigns, in the penal sum of Two hundred Fifty Dollars ($250.00) to be paid by the said D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, for the payment of which well and truly to be made, we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, the above bounden D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, the defendant, has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, to reverse the judgment entered in the above entitled action by the District Court of the United States for the Eastern District of Missouri, against the defendant in the sum of Seven thousand Three hundred Seventy-six and 41/100 Dollars ($7376.41), together with costs.

Now, Therefore, if said D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, a corporation, shall prosecute said appeal to effect and answer all costs, if it fail to make said appeal good or if said appeal is dismissed or the judgment [fol. 4] affirmed, or if it answers such costs as the Appellate Court may award, if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

Dated April 4, 1940.

D'OENCH, DUHME & CO., INC.,
Principal.

By Herman Duhme, President.

Attest:
William Pagenstecher, Secretary.

HERMAN DUHME, Surety.

LOUIS H. KRIETMEYER, Surety.

State of Missouri,
City of St. Louis—ss.

On this 6th day of April, 1940, before me a Notary Public, within and for said city and state, personally appeared Herman Duhme, known to me to be the person described in and who executed the foregoing instrument on behalf of D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, a corporation, as its President, the defendant, and known to me to be the duly authorized officer of said corporation, and he acknowledged to me that he executed said instrument and subscribed the name of said defendant as Principal thereto and his own name as President thereof.

M. F. SCHUMANN,
(Seal) Notary Public.

My commission expires: July 24, 1940.

[fol. 5] Complaint.

(Filed April 22, 1939.)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

205 vs.

D'Oench Duhme and Co., Inc., a corporation, Defendant.

1. Comes now Plaintiff, Federal Deposit Insurance Corporation and states that it is a corporation organized and existing under and by virtue of an act of Congress of the United States, being Title 12, Sec. 264 (a) United States Code Annotated; that the total issued capital stock of plaintiff is $289,299,556.99 of which amount the United States Government owns more than one-half, to-wit: the amount of $150,000,000.00; that this action arises under the laws of the United States, Title 12, Section 264 (j) (Fourth) United States Code Annotated and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000; That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and has its principal office and place of business in the City of St. Louis, Missouri.

2. Defendant on or about January 1, 1933 executed and delivered to Belleville Bank & Trust Company a promissory note in the principal amount of Five Thousand Dollars payable on demand with interest from date at the rate of six per cent per annum, a photostatic copy of which is hereto annexed as Exhibit A; that thereafter the Belleville Bank & Trust Company assigned said note to plaintiff and plaintiff is the holder thereof in due course; that interest on said note was paid to May 1st, 1933.

3. Plaintiff has demanded payment of said note from [fol. 6] defendant and payment has been refused and defendant owes to plaintiff the amount of said note and interest at six per cent per annum from May 1st, 1933.

Wherefore, plaintiff demands judgment against defendant for the sum of Five Thousand Dollars ($5000.00) and interest from May 1st, 1933, together with ten per cent (10%) additional on the principal and interest as attorney's fee, in accordance with the provisions of said note, and costs.

WILLIAM O'HERIN,
Attorney for Plaintiff,
Address: 1105 Commerce Building,
St. Louis, Missouri.

Leahy, Walther, Hecker & Ely,
Of Counsel.

Clerk's Note: Plaintiff's exhibit "A" duly attached to the original petition, is not attached hereto, for the reason that same appears as plaintiff's exhibit "1" of the transcript of the evidence and proceedings of this transcript of the record on appeal.

[fol. 8] (Summons and Marshal's Return.)

District Court of the United States for the Eastern District of Missouri, Eastern Division.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

File No. 205 vs. Civil Action

D'Oench Duhme Company, Inc., a corporation, Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon William O'Herin, Esq., plaintiff's attorney, whose address

is 1105 Commerce Bldg., St. Louis, Mo., an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAS. J. O'CONNOR,
Clerk of Court.
By Ruby Barham,
Deputy Clerk.

(Seal of Court)

Date: April 22, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 9] Return on Service of Writ

I hereby certify and return, that on the 24th day of April 1939, I executed the within summons by serving it on the within-named D'Oench Duhme Company, Inc., a corporation, by delivering a true and correct copy of Summons and Petition as furnished by the Clerk of the Court to Louis H. Krietmeyer, Vice President of the within-named D'Oench Co., Inc., a Corp., at St. Louis, Missouri.

WILLIAM B. FAHY,
United States Marshal.
By Tilden Delaney,
Deputy United States Marshal.

Marshal's Fees

Travel	$ .06
Service	4.00
	4.06

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Endorsed: Filed in U. S. District Court on April 29, 1939.

[fol. 10] Answer

(Filed May 16, 1939)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205 vs.

D'Oench Duhme Company, Inc., a corporation, Defendant.

1. Defendant, designated in plaintiff's Petition as D'Oench Duhme Company, Inc., a corporation, denies that it is a corporation or that it ever was incorporated because at the time of the commencement of said action, there was not, nor is there now, any such corporation as the D'Oench Duhme Company, Inc., named as defendant herein, but that the true name of such defendant is D'Oench, Duhme & Co., Inc.

2. The complaint fails to state a claim against defendant upon which relief can be granted.

3. Defendant admits plaintiff is a corporation organized and existing under and by virtue of an Act of Congress of the United States.

4. Defendant admits that on or about January 1, 1933, it executed and delivered to Belleville Bank & Trust Co., a bank doing business in the City of Belleville, Illinois, a promissory note in the principal amount of $5,000 payable on demand and that said note recites it shall bear interest from date at the rate of six per cent per annum.

5. Defendant states it is without information concerning the total issued capital stock of plaintiff and what part thereof may be owned by the United States government but said allegations in plaintiff's Petition are immaterial and redundant and should be stricken therefrom.

[fol. 11] 6. Defendant denies that the Belleville Bank & Trust Co. assigned said note to the plaintiff and that the plaintiff is the holder thereof in due course and states that plaintiff is the holder thereof after maturity; defendant further denies that it has paid any interest on said note.

7. Defendant denies each and every other allegation contained in the complaint.

8. Defendant further answering states that at the time said note was executed by the defendant, the defendant never received any benefit of the same and said note was given without any consideration whatever; that said note is a renewal note of one of a series of renewal notes given by the defendant to the Belleville Bank & Trust Co. at the request of said Belleville Bank & Trust Co. and that the original notes, out of which the note herein sued on grew, were originally executed on or about August 1, 1926, and consisted of two promissory notes, one in the principal amount of $2,000, payable on demand, a photostatic copy of which is hereto annexed as defendant's Exhibit A and the other in the principal amount of $3,000 payable on demand, a photostatic copy of which is hereto annexed as defendant's Exhibit B; that at the time said notes were originally executed by the defendant, the defendant never received any benefit of the same and said notes were given without any consideration whatever; that contemporaneously with the giving of said notes defendant received from the Belleville Bank & Trust Co. an agreement that said notes would not be called for payment, and an agreement that no suit would be brought on said notes.

9. Defendant alleges that the plaintiff is engaged in the business of insuring banks coming within the provisions of Title 12, Section 264, United States Code Annotated; that the said Belleville Bank & Trust Co. was one of the banks so insured by plaintiff corporation on or about the 10th day of March, 1933; that said bank was insured by plaintiff at all times thereafter and until on or about the ..... day of February, 1938, said bank was [fol. 12] closed; that during all of said time plaintiff had access to all of the books and records of said bank and did examine the same many times and was familiar with its affairs and banking transactions; that by reason of such relationship plaintiff had or by the exercise of reasonable care could have had full knowledge of the agreements and defenses existing between said bank and this defendant and if the plaintiff was assigned said note then plaintiff took the same with full knowledge of the circum-

stances and defenses herewith pleaded; that by reason thereof plaintiff is estopped to assert a claim against the defendant, or to demand payment of said note, or to file suit thereon.

10. Defendant alleges that at the time the plaintiff took over from the bank the note herein sued on and at all times theretofore said note showed on its face that no interest had been paid thereon since the date of the note, and showed that said note had been dishonored and plaintiff had notice thereof; and alleges further that the endorsement of interest paid as now shown by the copy of the note attached to plaintiff's Petition was made thereon either by the plaintiff or by the said Belleville Bank & Trust Co. at the plaintiff's direction after said note was in the possession of the plaintiff and without any payment being made thereon by defendant.

11. Defendant alleges that even if the plaintiff was the holder of said note in due course, which this defendant denies, plaintiff only holds said note as security to the obligation of said bank to repay to plaintiff the amount paid by plaintiff on its guaranty; that by reason thereof and because there is an agreement by said bank not to demand payment of said note nor to file suit thereon, this plaintiff is estopped to demand payment thereof or to file suit thereon until all other assets of said bank which the plaintiff now holds or may hold have been exhausted and plaintiff has determined that such assets, exclusive of the note executed by the defendant herein, is insufficient to reimburse plaintiff the money it has paid by reason of its guaranty.

12. Wherefore, defendant demands:

(1) That the Court dismiss the action or in lieu thereof [fol. 13] quash the return of service of summons because at the time of the commencement of said action there was not, nor is there now, any such corporation as the D'Oench Duhme Company, Inc.

(2) That the Court dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(3) That the Court discharge defendant from all liability in the premises.

(4) That the Court award to the defendant its costs herein.

JOHN W. GIESECKE,
Attorney for Defendant,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.

[fol. 14] State of Missouri,
City of St. Louis—ss.:

William Pagenstecher, of lawful age, being duly sworn upon his oath states that he is the Secretary of D'Oench, Duhme & Co., Inc.; that there was not, nor is there now, to the knowledge of this affiant any such corporation as the D'Oench Duhme Company, Inc. designated in plaintiff's Petition as a corporation.

And further affiant saith not.

WILLIAM PAGENSTECHER.

Subscribed and sworn to before me this 13th day of May, 1939.

M. F. SCHUMANN,
(Seal) Notary Public.

My commission expires: July 24, 1940.

[fol. 15] (Reply filed; Motion of Defendant to strike Reply overruled; Cause submitted, November 20, 1939.)

Before Hon. J. C. Collet.

November 20, 1939.

Now plaintiff's reply to defendants answer is filed herein by leave. Oral motion of defendant to strike said reply of plaintiff is made, submitted and overruled.

Whereupon final hearing of cause before the Court is commenced and concluded and issues submitted to the Court on briefs to be hereafter submitted within ten days. And now the Court orders transcript of evidence to [bw] delivered within ten days.

[fol. 16] Reply.

(Filed Nov. 20, 1939.)

Comes now plaintiff and by leave of Court files this its reply to defendant's answer and for said reply denies each and every allegation contained in said answer.

Further replying plaintiff states that the note here sued on, if given as a renewal note of one or more prior notes given by the defendant to the Belleville Bank & Trust Company, as alleged by defendant, is a new contract and not subject to any defenses which defendant alleges it had to said prior note or notes. That if, as alleged, the note here sued on and those notes prior thereto of which it was a renewal, were merely accommodation paper and given without a consideration, all of which is denied by plaintiff, then defendant is estopped to assert said defenses for the reason that the execution of the aforesaid notes was made for the purpose of permitting the Belleville Bank & Trust Company to avoid having its books and records show any past due bonds or obligations in the assets of said Bank which would constitute a misrepresentation of the assets of said Bank and deceive the Creditors, State Banking authorities and this plaintiff in any examination of the condition of said Belleville Bank & Trust Co., and this fact was well known to defendant Company, its officers and [fol. 17] agents who thereby participated in said misrepresentation. And defendant is further estopped to assert the hereinabove mentioned defense for the reason that defendant paid to the Belleville Bank & Trust Company interest on said notes from August, 1926 until March, 1932 in the amount of $1601.56 in order that the aforesaid notes would appear in the records of said Belleville Bank & Trust Company as a good asset or live paper, which likewise would serve to misrepresent the condition of said Bank to the Creditors of said Bank and the examining authorities, all of which was known to defendant, its officers and agents and in which they participated.

LEAHY, WALTHER,
HECKER & ELY,
Attorneys for Plaintiff.

[fol. 18] Transcript of Testimony and Proceedings.

(Filed Nov. 28, 1939.)

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation,
Plaintiff,
No. 205. vs.
D'Oench, Duhme Company, Inc., a corporation,
Defendant.

Be It Remembered, that on November 20, 1939, at 4:15 P. M., this matter coming on to be heard before the Hon. John C. Collet, Judge of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, in Court No. 3 thereof, at Federal Building, 12th and Market Streets, in the City of St. Louis and State of Missouri, the following proceedings were had:

Appearances:

For Plaintiff: Leahy, Walther, Hecker & Ely, By William O'Herin, Esq.

For Defendant: John W. Giesecke, Esq.

[fol. 19] Mr. O'Herin: Now, with respect to the jurisdictional facts, Your Honor, it is agreed that the Federal Depost Insurance Corporation is a corporation organized and existing under an Act of Congress of the United States, being Title 12, Section 364 (j) (Fourth), United States Code Annotated; that the total issued capital stock of the Federal Deposit Insurance Corporation is $289,299,556.99, and that of that amount the United States Government owns $150,000,000. (At this point a brief remark was made off the record) It is further agreed that this suit arose under the laws of the United States, Title 12, Section 264 (j) (Fourth), United States Code Annotated.

It is further admitted that on or about January 1, 1933, the defendant Company executed the note in the principal amount of $5,000, which is here in suit. Is that correct?

Mr. Giesecke: Yes, sir.

Mr. O'Herin: And I believe we also agreed that it might be admitted that der and was made for payment. Or do you want me to put that in evidence?

Mr. Giesecke: Wait a moment until I confer with my client.

Whereupon, the plaintiff to sustain the issues on its part offered the following evidence:

(A note and a photostatic copy thereof are marked by the reporter "Plaintiff's Exhibit 1")

Mr. O'Herin: At this time, Your Honor please, I would like to introduce in evidence the original note sued on here, which has been marked "Plaintiff's Exhibit #1", and ask [fol. 20] permission to substitute a [photostratic] copy of it.

The Court: Is that agreeable?

Mr. Giesecke: That is agreeable; yes, sir.

The Court: Very well.

(Which said "Plaintiff's Exhibit 1" is as follows:

Belleville Bank & Trust Company
Belleville, Illinois

#42561-

$5000.00/100 Belleville, Ill. Aug 1st 1933

M Stewart after date, for value received, we promise to pay to

Belleville Bank & Trust Company

Five thousand 00/100 DOLLARS,

with interest from date at the rate of 6 per cent. per annum, payable semi-annually and ten per cent. additional on the principal and interest as Attorney's fees in case said note and interest is not paid when due and the same is placed in the hands of an Attorney for collection.

Protest, presentation and notice waived. Payable at the office of BELLEVILLE BANK AND TRUST COMPANY at Belleville, Illinois.

No. 44069 Due

Renewal 459

D'Orsay Perfume Co Inc
by Louis N. Kreitzman
Secy

PLEDGE OF COLLATERAL.

BELLEVILLE, ILL. Aug 1st 1933

Being one of the makers of the above promissory note and being desirous of securing the payment thereof, as also any other indebtedness and liability due or to become due or that may hereafter be contracted by ____ with the payee of said note as collateral security therefor, pledge the following securities, to-wit:

No 3 - U. S. Steam Navigation Co. 1st Mtge. Sinking Fund 6% Gold Bonds $1000 - Each

No 4 - 10 Kentucky & Mississippi Co. 1st Mtge. 6% Gold Bonds $1000 - Each

which said security, securities, or any part thereof or any addition thereto or substitute therefor We hereby give to said pledgee, or its Attorney or Agent, authority and power to sell upon the non-payment of the said note; or at any time before maturity of said note, if in the judgment of the said pledgee said security, additions thereto or substitute therefor, or any part thereof shall have depreciated in value; such sale may be made public or private in the discretion of the pledgee and with or without advertising the same, or giving any notice of such sale or redemption to pledgor; and hereby waiving all right of redemption after such sale and also expressly waiving and releasing said pledgee or its assignee or assignees from the obligation of presentment for payment, protest or notice of dishonor of any of said collateral securities. And said pledgee is hereby given the right and privilege of becoming the purchaser of said security, securities, additions thereto and substitutes therefor, or any part thereof at such public or private sale and authorize the said pledgee in its discretion to enforce the collection of said security, securities, additions thereto and substitutes therefor, or any part thereof by suit or otherwise and to employ an Attorney or Attorneys for such collection or legal proceedings. The proceeds of such sale or collection of said security, securities additions thereto and substitutes therefor, shall be applied as follows: First, to the payment of all costs, expenses and Attorney's fees incurred in making such sale, collection or instituting legal proceedings; second, to the payment of the said promissory note; third, apply the balance, if any, to the payment of any other indebtedness owing by We to the pledgee hereof at the time of such sale or collection, and the surplus, if any, pay to We

D'Orsay Perfume Co Inc
by Louis N. Kreitzman
Secy
PLEDGOR

INTEREST PAYMENTS.			
DATE	PAID TO	AMOUNT	
8-10-28	5-1-33	100	00

Offset 5% 8/10-33

EXHIBIT "A".

PAY TO THE ORDER OF

Federal Deposit Insurance Corporation.

-without recourse

BELLEVILLE BANK & TRUST CO.

By [signature]

ASST. CASHIER

DATE	PAID	BAL.	

[fol. 22] (The reporter marks for identification a paper consisting of four sheets "Plaintiff's Exhibits 2a, 2b, 2c and 2d," respectively)

Mr. O'Herin: If Your Honor please, I would like to introduce in evidence at this time an application to the Federal Deposit Insurance Corporation for a loan under Section 12b ..... of the Federal Reserve Act, which was made by the Belleville Bank & Trust Company, and which consists of four pages and has been marked "Plaintiff's Exhibit 2a to 2d," inclusive. And I might say at this time that this is in a bound record of the plaintiff company, and we will have a separate copy made and furnish Mr. Giesecke and Your Honor a copy, if we may have the permission so to do.

The Court: That is entirely satisfactory.

Mr. O'Herin: And it is agreed there is no question in this case but what the officers of the Belleville Bank & Trust Company had authority to execute this application and make this loan from the Federal Deposit Insurance Corpo-
[fol. 23] ration. That is another matter Mr. Giesecke and I agreed upon.

(Which said Plaintiff's Exhibit "2a" and "2d" are annexed hereto in part as per stipulation; exhibits "2b" and "2c" are omitted as per stipulation.

[fol. 24] (Plaintiff's Exhibit 2.)

Pl Ex 2a
11/20/39

Application to Federal Deposit Insurance Corporation for Loan Under Section 12B, (n) (4), of the Federal Reserve Act, as Amended.

The Belleville Bank & Trust Company (hereinafter called Bank), a corporation duly organized and existing under and by virtue of the laws of Illinois, having its principal office at Belleville, Illinois, hereby applies to the Federal Deposit Insurance Corporation, Washington, D. C. (hereinafter called the Corporation) for a loan in the principal sum of not exceeding $1,500,000.00. Said loan shall be evidenced by the note or notes of Bank in the form of Exhibit A hereto attached and shall be secured by the col-

lateral described in Exhibit B hereto attached and by all other collateral securing the indebtedness.

For the purpose of obtaining such loan and of inducing the Corporation to accept as collateral the property described in said Exhibit B together with any other property offered as collateral and of influencing the action of the Corporation on this application, Bank warrants, represents, covenants and agrees with the Corporation as follows:

1. That Bank proposes to sell certain of its assets to the The First National Bank of Belleville, a corporation organized and existing under and by virtue of the laws of United States of America, having its principal office at Belleville, Illinois, (hereinafter called Purchasing Bank) in consideration of the assumption of the deposit liabilities of Bank by Purchasing Bank. That Exhibit C attached hereto is a full, true and correct statement of the assets and liabilities of Bank according to its books and of the assets (exclusive of the proceeds of the loan for which application is made herein) to be sold by Bank to the Purchasing Bank and of the liabilities of Bank to be assumed by the Purchasing Bank, and of the properly listed in said Exhibit B.

* * * * *

4. The proceeds of the loan herein applied for will be paid over by Bank to Purchasing Bank as part of the consideration for the agreement of Purchasing Bank to assume the deposit liabilities of Bank and Bank agrees that the Corporation shall be and is hereby subrogated to the rights of the depositors against Bank to the extent of the indebtedness of Bank to the Corporation.

* * * * *

Pl. Ex. 2d.

[fol. 25] Executed this 2nd day of April, 1938.

BELLEVILLE BANK &
TRUST COMPANY,
(Exact corporate title of Bank)
By J. B. Reis President
(Seal) (Signature) (Title)

Attest:

A. H. Heinemann,

Asst. Cashier.

(Signature) (Title)

[fol. 26] (The reporter marks a note for identification "Plaintiff's Exhibit 3".)

Mr. O'Herin: I would now like to offer in evidence, if Your Honor please, the note. I might say in passing, this is a copy of the original note which is in Washington, and it has been agreed by Mr. Giesecke and myself that a copy might be used. It is a copy of the note executed by the Belleville Bank & Trust Company to the Federal Deposit Insurance Corporation, which is the note of which this note was in the collateral that was pledged to secure it. That is the principal note in the amount of $1,349,558.07. In this instance we will also furnish a copy of that in lieu of what we are now offering here, and we will be very glad to furnish Mr. Giesecke a copy of that also.

(Which said "Plaintiff's Exhibit 3" is annexed at the end of this record) Clerk's Note: Omitted as per stipulation.

(A paper is marked by the reporter for identification "Plaintiff's Exhibit 4".)

Mr. O'Herin: I offer in evidence "Plaintiff's Exhibit #4," which is page 0096 of Schedule B-7, which covers charged-off assets. Schedule B, including all of the numerals from B-1 on down to B-7, is a schedule of collateral [fol. 27] which was pledged as security to the Federal Deposit Insurance Corporation, and this particular page lists the obligation here sued on, the present note. And we will furnish a copy of that.

(Which said "Plaintiff's Exhibit 4" is annexed hereto in part as per stipulation.)

[fol. 28] (Plaintiff's Exhibit 4.)

11/20/39.

A. P.

Schedule B (7) 0096

Charged Off Assets.

Maker(s) Indorser(s)	Date	Amount of Note	Interest Rate	Due Date
D'Oench Duhme & Co. Inc. by Louis H. Krietmeyer, Secy. Secured by Bds. No. 3, 4 & 5 for $1000.00 each, Countys of Green and Randolph, Arkansas, Beaver Dam Drainage District, 5½% Improvement Bonds, dated 2/2/20, due 8/1/26, Demand Certificate No. 39-564 of Belleville Bank & Trust Co., payable to itself, amount $100 in payment of Bonds 9 and 10 for $1000.00 each of Kentawka Drg. Neshoba Cty. Mississippi.	1/1/33	5000.00	6	Dem.

[fol. 29] (A paper is marked for identification by the reporter, "Plaintiff's Exhibit 5".)

Mr. O'Herin: I now offer in evidence, Your Honor please, "Plaintiff's Exhibit 5", which is power of attorney

to the Federal Deposit Insurance Corporation, executed by the Belleville Bank & Trust Company. And in that instance we will likewise have a copy made of that and furnish one to the Court and one to Mr Giesecke.

(Which said "Plaintiff's Exhibit 5" is annexed at the end of this record.) Omitted as per stipulation.

R. R. BANJAN, of lawful age, produced, sworn and examined, testified on behalf of plaintiff as follows:

Direct Examination.

By Mr. O'Herin:

Q. Please state your name.

A. R. R. Banjan.

Q. Where do you live? A. Belleville, Illinois.

Q. What is your business?

A. Assistant liquidator of the Federal Deposit Insurance Corporation.

[fol. 30] Q. And as such are you directing or assisting in any way the handling of the matters on behalf of the Federal Deposit Insurance Corporation in connection with the Belleville Bank & Trust Company and the loan which the F. D. I. C. made to that bank? A. I am.

Q. Now I show you here Plaintiff's Exhibit No. "3", which is a demand note dated April 4, 1938, executed by the Belleville Bank & Trust Company, payable to the Federal Deposit Insurance Corporation at its Washington office, in the principal amount of $1,349,558.07, and ask you if demand was made for the payment of that note to the Belleville Bank & Trust Company; and if so, when?

A. Demand was made by the Washington office during the month of April, 1938.

Q. Now then, I show you here Plaintiff's Exhibit No. "1", which is a note of D'Oench, Duhme Company, Incorporated, in the amount of $5,000, payable to the Belleville Bank & Trust Company, dated January 1, 1933, and ask you if that note was received by the Federal Deposit Insurance Corporation as collateral to the principal note executed to the F. D. I. C. by the Belleville Bank & Trust Company?

A. Yes, sir; it was.

Q. And it shows, I believe on its back, that it was en-
[fol. 31] dorsed to the F. D. I. C. by the Belleville Bank & Trust Company? A. Yes, sir.

Q. Now then, thereafter was demand made on D'Oench, Duhme Company for payment of that note. And if so, do you know when that was, or do you have any record of it?

A. That demand was made for payment of that note, but I do not have a carbon copy of that letter with me where the demand was made.

Q. You wrote a letter to D'Oench, Duhme Company?

A. Yes, sir; but I do not have that file.

Q. Do you know about when it was made? What is your best recollection on it?

A. Well, that demand was made some time during 1938. I can't say. The latter part of 1938.

Q. And nothing has been paid to the F. D. I. C. on it subsequent to that demand?

A. Well now, there was a credit placed on that note, this particular note, $5,000, of $100.

Q. You might as well explain that right now because they will wish to have that in the record in any event.

A. When the Federal Deposit Insurance Corporation took over those assets, in this file with the collateral was a certificate of deposit dated August 14, 1937, Number 39564, and together with that was an invoice showing that Sed-
[fol. 32] don, Morfit & Harvey, Incorporated, purchased $2,000 of the Missippi Kentawaka drainage bonds due 1926, at $5 flat, and on October 10, 1938, this $100 was used to pay the interest on this note to May 1, 1933, using this certificate of deposit to do so, and that was a payment that was made, which is endorsed on the note.

Q. And other than that no other payment has been made?

A. No other payment has been made.

Q. And at the time demand was made on the defendant Company by the plaintiff, no payment was made at that time or subsequent thereto?

A. No, sir.

Mr. O'Herin: You may inquire.

Cross-Examination.

By Mr. Giesecke:

Q. Mr. Banjan, the note of D'Oench, Duhme Company, to which you have reference is listed in these schedules as a charge-off asset of the Belleville Bank & Trust Company? Is that correct? A. Yes, sir.

Q. When was that charged off?

A. That note was charged off on July 29, 1935.

Q. And at the time, then, that the bank failed and the F. D. I. C. came in and entered into this transaction at the Bank, at no time between 1935 and that time was that note ever put back as an admitted asset, was it?

[fol. 33] A. State that again.

Q. I mean between 1935 and the time you took over the asset as collateral, at no time was that note ever listed again as an admitted asset of the Belleville Bank & Trust Company?

A. Not in their statement; no, sir. It was in the charge-off assets.

Q. Now, the Federal Deposit Insurance Company has examiners, has it not? A. Yes, sir.

Q. And it is their duty to frequently examine insured banks? A. Yes, sir.

Q. Can you tell us when the Federal Deposit Insurance Corporation examiners examined the Belleville Bank & Trust Company?

A. The Federal Deposit Insurance Corporation examined the Belleville Bank & Trust Company on April 23, in 1934, April 26th, in 1935, April 27th in 1936, and September 20th in 1937.

Q. And when was it you understood the note was charged off?

A. The note was charged off on July 29, 1935.

Q. Was that because the Federal Deposit Insurance Corporation told the Bank to charge it off?

A. I couldn't answer that.

Q. You don't know? A. No, sir.

Q. But if it was charged off in 1935 the Federal Insur-

[fol. 34] ance Examiner thereafter would be aware of the fact the note had been charged off? A. Yes, sir.

Q. Now, the note from D'Oench, Duhme Company, doesn't it show on its face that is a renewal note?

A. Yes, sir.

Q. And will you tell the Court what is the date of the interest endorsement on the back of that?

A. August 10, 1938.

The Court: That is the endorsement item?

A. Yes, sir.

Q. That was subsequent to the time the note was in possession of the Federal Deposit Insurance Corporation, when they first got it? They first got it in April, 1938?

A. Yes, sir.

Q. And that endorsement was made by the Federal Deposit Insurance Corporation? A. Yes, sir.

Q. No money was ever paid any time from January 1, 1933, up until the present time on that note by D'Oench, Duhme Company, Incorporated, was it?

A. January 1, 1933?

Q. Yes, sir. A. No, sir.

Q. You testified that the interest credit on the note came from a certificate of deposit, I think?

[fol. 35] A. Yes, sir.

Q. Was any demand ever made on D'Oench, Duhme Company? Or rather was any notice ever given to them that these two thousand dollar bonds were going to be sold?

A. I can't answer that.

Q. You don't know that?

A. No, sir; I don't know.

Q. Now, the endorsement from the Belleville Bank & Trust Company to the Federal Deposit Insurance Company says "Without recourse?" A. Yes, sir.

Q. Did they put that "without recourse" on every note that they endorsed to the Federal Deposit Insurance Corporation? A. Yes, sir; every note.

Q. They didn't distinguish between those which were among the charged off assets and those which were among the other assets in these schedules?

A. None whatever. That was on every note.

Q. On every note? A. Yes, sir.

Q. Mr. Banjan, I hand you herewith a page No. 0112 in the file connected with the application of the Belleville Bank to the Federal Deposit Insurance Company. It is marked "Exhibit D" and headed "Deposit Liabilities of the Belleville Bank & Trust Company, Belleville, Illinois, according to the various classes of deposits in amount

thereof subject to the maximum insurance limit of $5,000." [fol. 36] Will you tell the Court what was the insurance liability of the Federal Deposit Insurance Corporation, the maximum insurance liability of the Federal Deposit Insurance Corporation when the bank closed, as set out in that page?

A. The maximum amount of deposit liability of the bank?

Q. No, sir; of the Deposit Insurance Corporation.

A. $1,958,327.00.

Q. And what was the deposit liability of the Bank?

A. $2,795,130.55.

The Court: In other words, that meant, did it, gentlemen, that there was about approximately $800,000 on deposit in excess of $5,000?

Mr. Giesecke: Yes, sir; I was just going to get to that. The figure is $836,803.55.

Q. Now, then, the First National Bank assumed the entire deposit liability, did it not, of two million, seven hundred and ninety-five some odd thousand dollars?

A. Yes, sir.

Q. And the Federal Deposit Insurance Corporation loan was one million, three hundred and forty-nine some odd thousand dollars? A. Yes, sir.

Q. That means, then, that the First National Bank of Belleville received other assets in addition to the million, [fol. 37] three hundred and forty-nine thousand dollars furnished by the F. D. I. C. in the total sum of a million, four hundred and forty-five thousand, five hundred and seventy-two dollars?

A. Let me get those figures again here. Are you taking these two—

Q. No, sir; the difference between—

A. The difference between the insurance and the total amount of deposit?

Q. I will put the question another way: The First National Bank, before it would assume the obligation to meet the deposit liabilities of the Belleville Bank, insisted upon having assets which in its opinion were equivalent to the amount of these deposit liabilities? Isn't that correct?

A. Either assets or cash in the total amount of deposits.

Q. And the total deposit liability was two million, seven hundred and some odd thousand dollars? A. Yes, sir.

Q. And the F. D. I. C. put up a million, three hundred and some odd thousand dollars?

A. Loaned the Belleville Bank.

Q. Therefore, the total deposit liability, and amount of cash furnished by the Federal Deposit Insurance Corporation, would be $1,445,000.00, approximately?

A. Well, the value of the bonds—of course, there are [fol. 38] some offsets that might be taken.

Q. These offsets do not amount to anything of any consequence?

A. Well, that might be. I can't remember all those figures here, but there are offsets. This will tell the total amount given over to the Bank. The total $1,453,816.00.

Q. That is the total amount of the deposit liability that the First National Bank assumed?

A. Total amount of the assets.

Q. Exclusive of that loan? A. Yes, sir.

Q. And the deposit liability which they assumed was that amount of assets plus the amount of the Federal Deposit Insurance loan? Isn't that correct?

A. No, sir. It was approximately $2,896,373 and some cents. That was the amount.

Q. Well, that is—

A. The deposit liability assumed by the First National Bank of Belleville.

Q. And that is equal to the amount of the loan from the F. D. I. C. to the Belleville Bank plus the amount of the other assets which the Belleville Bank transferred to the First National Bank? A. That is right.

Q. In other words; the value of the assets exclusive of [fol. 39] the F. D. I. C. assistance was approximately, as you testified, 1,400,000 some odd dollars? A. Yes, sir.

Q. Using those figures, then, as a basis, didn't the Federal Deposit Insurance Corporation lend the Bank a sum of money larger than their liability would have been had the Bank liquidated? A. No; no, sir.

Q. You would say not? A. No, sir.

Q. The assets which the First National Bank took over exclusive of the Federal Deposit money, is roughly 1,-

500,000 and the liability which they assumed is roughly 2,800,000?

A. The amount of money that the F. D. I. C. were insuring was 1,958,000.

Q. I understand that, but I say the value of the assets, exclusive of this pledge to the F. D. I. C. was roughly a million and a half, was it not? A. Yes, sir.

Q. And the total deposit liability of the Bank was approximately $2,800,000? A. That is right.

Q. Now, if the Bank had liquidated the assets which went to the First National Bank, that million and a half would of itself have paid depositors approximately 55 cents on the dollar?

[fol. 40] A. That would if we could liquidate it. Those have to be liquidated on some of those assets, it wasn't all cash.

Q. Nevertheless, the First National Bank took them over as though they were cash?

A. They did; they gave full value; but nevertheless, they have to collect on those assets.

Q. Assuming they would liquidate for that amount, then that would have paid on the deposit liability of the Bank approximately 55 cents on the dollar without the assistance of any of the collateral which was turned over to the Federal Deposit?

A. If they collected in full on all of those assets they would have, naturally.

Q. The Federal Deposit Corporation was liable on a total deposit liability of approximately 1,950,000?

A. Yes, sir.

Q. So that if just the assets which went to the First National Bank had liquidated at 55 cents on the dollar, that would have reduced the liability of the Federal Deposit Insurance Corporation to about $1,000,000, wouldn't it?

A. No, sir; reduced it down to $1,200,000.

Q. Isn't 55 per cent of 1,950,000 approximately $1,000,000? A. $1,400,000 is what the First National took.

Q. Well, the Deposit Insurance liability was $1,900,000?

A. Yes, sir.

[fol. 41] Q. And if those particular assets liquidated at 55 cents on the dollar your Deposit Insurance liability would receive a credit of 55 per cent?

A. Of 1,453,000, which would be approximately 700,000 from 1,958,000, would be 1,200,000 left to pay, yes, sir. You mean if we got 55 cents on the dollar on the assets the First National Bank took from the Belleville Bank that the liability then of the Bank—

Q. Every depositor would receive 55 cents on the dollar out of those assets alone?

A. Oh? You didn't state it that way.

Q. All right.

A. Yes, sir; that is right.

Q. 55 cents on the dollar? A. Yes, sir.

Q. Then on 1,958,000 those depositors would have received 55 cents on the [dollars], would they not?

A. No, sir; we would not have received it.

Q. I didn't say "you". I say the depositors you insured would have.

A. The depositors were insured, they would receive the full amount of money right at the beginning when a bank fails [—] the Federal Deposit Insurance Corporation.

Q. All right; you would have received it then because you would have taken over the claim against the Bank?

A. We would have received our pro rata share on the [fol. 42] amount of claims assigned to the Federal Deposit Insurance Corporation if it had gone into receivership and that amount of money would have been liquidated.

Q. In other words, then, your claim would have been for 1,950,000? A. That is right.

Q. You would have paid off that Deposit Insurance liability. You would have a claim of 1,950,000, and on this amount on the dollar that the depositor would receive you would receive your share on the claim you had against the Bank? A. Yes, sir.

Q. If you would receive 55 cents on the dollar on your claim of 1,958,000, what would be the balance of your claim against the Bank then? It would be for 45 per cent of 1,958,000? A. Yes, sir.

Q. And that roughly would be a little less than $1,000,000, would it not? A. Yes, sir.

Q. But, as a matter of fact, you extended yourself beyond your insurance liability, did you not?

A. No, sir; no, sir, because you are assuming, of course you are assuming the full collection.

Q. Well, assuming then, assuming that the Bank collects all the assets they have received from the Belleville Bank & Trust Company, money will come back to the stockholders?

[fol. 43] A. Nobody can tell what an asset is worth until it is collected, and I wouldn't want to say we would get that much until it is collected.

Q. Do you think the First National Bank would have taken over the $1,445,000 assets unless they were sure they would get that out of it?

A. I will answer your question by citing a consolidation of banks, how they fail. I am just taking the difference between the consolidation of banks.

Mr. Giesecke: Well, we will leave that point.

Q. With respect to that certificate of deposit we were talking about a few minutes ago, to whom was that payable? A. The Belleville Bank & Trust Company.

Q. It was not payable to the D'Oench, Duhme Company? A. No, sir.

Q. In other words, after these bonds were sold, the Belleville Bank & Trust Company treated the money as its own and put the money into a certificate of deposit payable to itself?

A. I think they have a right, under the note that was assigned, to sell the collateral.

Q. Do you have that bill that showed the sale of those bonds? A. Yes, sir.

Q. Could I see that? A. Yes, sir.

Q. Will you state what that bill shows?

[fol. 44] A. "Bought from Belleville Bank & Trust Company, Belleville, Illinois, $2,000 Kentawka Drainage District bonds due 1926 at $5.00 flat, $100."

Q. It doesn't say that the bonds were for the account of D'Oench, Duhme Company? A. No, sir.

Q. That doesn't show on that bill? A. No, sir.

Q. What is the date of the bill?

A. July 30, 1937.

Mr. O'Herin: On the letter head. Where is that bill from Seddon, Morfit & Harvey, Incorporated, Investment Securities, 320 North Fourth Street, St. Louis?

Q. Can you tell when the Belleville Bank & Trust Company was insured by the plaintiff corporation?

A. On January 1, 1934, effective date of the insurance by the F. D. I. C. Corporation.

Q. And before they make this insurance they examine the Bank, don't they?

A. Well, I can't answer that whether they made an examination or not of this Bank.

Q. I didn't ask you whether they did of this particular Bank. It is customary for them to examine a bank before they insure?

[fol. 45] A. I am not in the Examining Department, and I had rather not answer because I don't know.

Q. You don't know even what the custom is?

A. No, sir.

Q. Now, Mr. Banjan, if the securities of the Belleville Bank which the Federal Deposit Insurance Corporation now holds should liquidate for a sum sufficient to pay the amount of money that you advanced them, that is if all the securities exclusive of this particular note herein sued on should liquidate, this note then would have to be returned to the Belleville Bank & Trust Company? Isn't that correct? A. Yes, sir.

Q. I think you stated on direct examination, Mr. Banjan, that it was the practice of the Federal Deposit Insurance Corporation to call its demand notes at once? Is that correct?

Mr. O'Herin: No, sir; I made that statement across the table. He said that demand was made on that note in April, 1938, I believe.

Mr. Giesecke: And that is the date of the note also, April, 1938?

A. Yes, sir.

Q. Is it the practice of the Federal Deposit Insurance Corporation to always make demand on these notes promptly?

A. Yes, sir; on the notes from the Bank to the F. D. I. C. [fol. 46] They are demand notes.

Q. You don't wait a year or two years on a demand note before you make demand on it? A. No, sir.

The Court: Do I understand demand was made at that time instead of the latter part of the year 1938?

Mr. Giesecke: There are two notes he has been talking about.

The Court: I am sorry. Go ahead. You are talking about the note from the Belleville Bank to the F. D. I. C.?

Mr. Giesecke: That is correct.

Q. How long have you been connected with the Federal Deposit Insurance Corporation?

A. Since April, 1938.

Q. Were you connected with the Corporation when the Belleville Bank made its application for this loan?

A. No, sir.

Q. You were not connected with it at that time?

A. No, sir.

Q. Was Mr. Stapleton?

A. Yes, sir. You mean connected with the F. D. I. C.?

Q. Yes, sir.

A. No, sir; I can't answer when he was.

Q. You do not know?

A. No, sir; I do not.

[fol. 47] Q. Do you know whether—if you know this—when the Bank makes an application to the Federal Deposit Insurance Corporation for a loan, they require the filling out of very comprehensive forms? Isn't that correct?

A. Well, an examiner comes in and makes out those necessary forms.

Q. An examiner with the Federal Deposit Insurance Corporation? A. Yes, sir.

Q. And then those forms and that application is sent down to Washington? A. Yes, sir.

Q. With the recommendation of the Examiner, I suppose? A. Yes, sir.

Q. And the loan is not made until after the application, which lists all of the assets of the Bank, is then examined and studied?

A. Well, I don't know the procedure in Washington.

Q. But the loan, of course, is not made until after the application is sent down there?

A. I don't know. I can't answer that because I have not been in a bank where an application was made at the time.

Q. Do you think it is likely they would make a loan without first studying their application?

A. I don't know. I wouldn't want to say. An examiner is on the ground and he might recommend it without an [fol. 48] application going in. I can't say just the procedure they follow.

Q. They would not make any recommendation, you are sure, until he had conducted a thorough examination?

A. Oh, absolutley not.

Mr. Giesecke: I think that is all.

Redirect Examination.

By Mr. O'Herin:

Mr. O'Herin: Just one thing we might clear up here.

Q. I notice, Mr. Banjan, that on the back of the note where they credit the $100 payment there is a notation "offset". Will you explain for the record what is meant by "offset" there?

A. That would be a deposit insured by the Corporation, and an offset is formed where somebody owes something on one side and they have a credit on the other, they use the credit and apply it on his obligation and term that as an offset.

Q. And that is the reason you put that notation on there? A. That is the reason that is marked "offset".

Q. Now then, you have had banking experience over a number of years, I believe, before you were with the Federal Deposit Insurance Corporation?

A. Twenty years.

Q. And I will ask you whether or not it is customary to make an attempt to realize on charge-off assets, and have you as a banker ever done that?

A. No, sir. I would say when they are charged off they [fol. 49] are put away in the safe and lie there.

Q. What about the Federal Deposit Insurance Corporation, has it been the practice to collect charged-off assets when they receive them as collateral?

A. The procedure of the Federal Deposit Insurance Corporation when they take over the assets is to start out

and notify each debtor, make a demand right on through the list. Of course, the last ones to be notified would be the charge-off because they come in the last.

Q. Come in the last of the schedule?

A. Come in the last of the schedule. And we notify them right on down, make a demand on everybody that we have a note against.

Mr. O'Herin: I think that is all.

Recross Examination.

By Mr. Giesecke:

Q. You do not place much reliance upon the charged-off assets, do you? A. Yes, sir; I say we do.

Q. You say you call on your list, and your experience as a banker—

A. We start with the alphabet, "A", and go on through.

Mr. O'Herin: Schedule B-7 is near the last.

A. Naturally, the charged-off assets are not as good as the assets in the bank or there wouldn't be any charged-off assets.

[fol. 50] By Mr. Giesecke:

Q. As a matter of fact, don't you frequently with the majority of these charged-off assets find there is either some defense to them or some reason why they have been charged off, that makes them worthless?

A. Sometimes you can't locate the parties, and by the time we get them a lot of them are outlawed.

Q. In the main you find there is some reason why they have been charged off?

A. I have been receiver for National Banks since 1934, and my experience on charged-off assets, when a bank goes into receivership everybody who has a claim says there is something wrong because they owe the bank; so it has been my practice to find when you notify a debtor, he comes in, and he always has some excuse—it isn't his signature, or it has been paid, but he never can produce evidence.

Q. In other words, with many charged-off assets you are not surprised when such defense as that comes up?

A. No, sir; in any of the assets.

Q. Will you tell me with reference to this offset, I don't quite understand your explanation of that notation "offset" on the back of the note.

A. The F. D. I. C. pays any amount up to $5,000. And if somebody owes the Bank and they have a credit in the ledger, they will then take the money from his checking ac- [fol. 51] count and apply it as a part payment on his note; [of] if he has more money in his checking account than the note, they will pay the note and give him the balance. That is what we term an offset.

Q. In this case a certificate of deposit was not payable to the maker of this note, if was payable to the Belleville Bank & Trust Company.

A. That has been the practice of banks, when they sell collateral of a debtor, to put a "C.D" in.

Q. "C.D." that draws 2 per cent interest?

A. It doesn't draw any interest; a demand certificate doesn't draw any interest.

Q. They take the cash and put it in a certificate of deposit? A. Sometimes.

Q. And do not credit it to the note, and claim interest at 6 per cent against the maker?

A. They do not get 6 per cent on the maker when it is charged off.

Mr. O'Herin: This was credited as interest?

A. This was credited as interest.

Q. (Mr. Giesecke) The certificate of deposit is dated 1937 you said? A. Yes, sir.

Q. But it was not credited on the note until 1938?

A. It only paid interest to May 1, 1933, so there was not any adjustment of the interest, from August 17th there was [fol. 52] not any adjustment of interest until July, 1937, on the hundred dollars, or we would have adjusted the interest as of July 30, 1937. This only paid the interest up and back to May 1, 1933; so there was no adjustment of the interest on the hundred dollars.

Q. Had that been credited to principal it would have cut down the interest that much?

A. That would cut down the interest from July 30, 1937, yes, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: That is all.

Mr. O'Herin: There is not any dispute about the proposition, as I understand you, that after the F.D.I.C. came in

possession of these assets that were given to secure the note, and among which was this note, but what they made due demand on the defendant company for the payment of the note?

Mr. Giesecke: I will say they made a demand. They didn't make any due demand.

Mr. O'Herin: I didn't quite mean that. What I meant was they made a prompt demand after they got it. Perhaps to keep the record straight I might put Mr. Stapleton on.

W. J. STAPLETON, of lawful age, produced, sworn and examined, testified on behalf of plaintiff as follows:

[fol. 53] Direct Examination.

By Mr. O'Herin:

Q. What is your name, please?

A. W. J. Stapleton.

Q. Where do you live?

A. Belleville, Illinois.

Q. What is your business?

A. Liquidator for the Federal Deposit Insurance Corporation.

Q. Are you handling the liquidation in connection with the loan that was made to the Belleville Bank & Trust Company by the F. D. I. C.? A. I am.

Q. Plaintiff's Exhibit No. "1" is the note of D'Oench, Duhme Company, which is the subject matter of this suit. Do you know approximately when the Federal Deposit Insurance Corporation made demand on D'Oench, Duhme for payment of that note, after it came into the possession of the corporation?

A. I think it was in the month of August, 1938.

Q. Had any prior demand been made, do you know?

Mr. Giesecke: By whom?

Mr. O'Herin: By the F. D. I. C. I am referring only to the plaintiff company.

A. That is all I can testify to. We sent a form letter out to all the borrowers of the Bank as soon as we could

get them all out after April 4, 1938, and it was afterwards followed up by individual letters. And I think we got through with all of them about August, 1938.

Mr. O'Herin: That is all.

[fol. 54] Cross-Examination.

By Mr. Giesecke:

Q. Mr. Stapleton, after you sent that notice to D'Oench, Duhme Company, the defendant here, did you hear from them?

A. Mr. Kreitmeyer and one of the partners—I don't know which it is—

Q. Mr. Duhme?

A. Mr. Duhme, I think it was, called at the office.

Q. What did they tell you about that?

Mr. O'Herin: Object to that as not cross-examination with respect to the subject matter of the direct examination.

(At this point a brief remark was made off the record.)

Mr. Giesecke: The purpose of the question is to show that immediately upon demand the people set up this defense that they were not—

Mr. O'Herin: I will admit that the first time they ever came in to talk to Mr. Stapleton about it they claimed they did not owe this money to the Belleville Bank & Trust Company.

Mr. O'Herin: Isn't that correct, the first time you met these gentlemen?

A. They brought some agreement that they had signed.

By Mr. Giesecke:

Q. When did you first become connected with the Federal Deposit Insurance corporation?

A. On or about April 15, 1938. However, my appointment dated back to April 2nd.

[fol. 55] Q. Did you have anything to do with the preparation of this application and the negotiations in connection with the assumption of the Deposit liabilities by the First National Bank? A. I did not.

Q. You had nothing to do with that? A. No, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: That is all.

Mr. O'Herin: Plaintiff rests.

Whereupon, the defendant to sustain the issues on its behalf offered the following evidence:

Mr. O'Herin: It is admitted that the defendant is a corporation incorporated under the laws of Missouri, I believe.

Mr. Giesecke: That is right.

Mr. O'Herin: May that be shown as part of my case, if the Court please?

The Court: Yes, sir. I notice the prayer of the answer says among other things (reading from the prayer of the answer). The admission is that the defendant is a corporation now?

Mr. Giesecke: Yes, sir; that is right. They amended.

Mr. O'Herin: We amended the caption by interlinea-
[fol. 56] tion during the summer.

The Court: All right; that clears that up. Thank you, gentlemen.

Mr. Giesecke: It is admitted that the note sued on here is a renewal note of one of the series of renewal notes given by the defendant to the Belleville Bank & Trust Company.

Mr. O'Herin: Yes, sir; we admit that. I don't know just how many of these renewal notes there were in between.

Mr. Giesecke: And it is admitted that the original notes out of which the note herein sued on grew were originally executed on or about August 1, 1926.

Mr. O'Herin: Yes, sir.

Mr. Giesecke: And consisted of two promissory notes, one for the principal amount of $2,000, payable on demand;

and the other in the principal amount of $3,000, payable on demand, and that the photostatic copy of these notes to the defendant's answer is a true copy of the notes.

Mr. O'Herin: We will admit that, Your Honor.

Mr. Giesecke: I think it is also admitted that at the time of the giving of these notes the defendant herein received from the Belleville Bank & Trust Company these two agreements, which I will introduce in evidence.

Mr. O'Herin: Yes, sir.

(Which said papers are marked by the reporter for [fol. 57] identification Defendant's Exhibits "A" and "B", respectively.)

Mr. O'Herin: I would like to qualify that admission with this understanding: I do not admit the relevancy or competency of them, but as to the identity and the fact they were given at that time, I will admit that. I am going to object to the relevancy and competency.

Mr. Giesecke: All right.

Mr. Giesecke: And that those instruments were both executed by A. H. Heineman, who at that time was Assistant Cashier of the Bank, and that he executed them on the order of Mr. Nick Wuller, Cashier of the Bank.

Mr. O'Herin: Yes, sir; we will admit that, Your Honor.

Mr. Giesecke: I will read Defendant's Exhibits "A" and "B" in evidence, Your Honor:

"Df. Ex. "A".

August 4th, 1926.

Received from D'Oench, Duhme & Co., Inc.....
Their demand note for $2,000.00, dated August 1st, 1926, to be held as security on $2,000.00 Kentawka Drainage District, Neshoba County, Missippi 6% bonds, due August 1st, 1926, Nos. 9 and 10, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid.

BELLEVILLE BANK & TRUST COMPANY,
Per A. H. Heinemann,
Officer,
Asst. Cashier."

[fol. 58] "Df. Ex. "B".

August 4th, 1926.

"Received from D'Oench, Duhme & Co., Inc..... Their demand note for $3,000.00, dated August 1st, 1926, to be held as security on $3,000.00 Beaver Dam Drainage District, Greene and Randolph Counties, Arkansas, 5½% bonds, due August 1st, 1926, Nos. 3, 4 and 5, $1,000.00 denomination.

This note is given with the understandnig it will not be called for payment. All interest payments to be repaid.

BELLEVILLE BANK & TRUST COMPANY,
Per A. H. Heinemann,
Officer,
Asst. Cashier."

The Court: Who executed those?

Mr. Giesecke: The Assistant Cashier of the Bank.

Mr. Giesecke: Is it also agreed, Mr. Wuller was the managing officer of the Bank at that time?

Mr. O'Herin: Yes, sir; I will admit that. I am objecting to the relevancy and competency of this, but as far as identification is concerned, that is correct. I will make the admission about Nick Wuller, I believe he was cashier and managing officer of the Bank at the time.

Louis H. Kreitmeyer, of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

[fol. 59] Direct Examination.

By Mr. Giesecke:

Q. Please state your name.

A. Louis H. Kreitmeyer.

Q. What is your business?

A. Investment Securities.

Q. You are connected with the defendant in this case, D'Oench, Duhme Company, Incorporated?

A. Yes, sir.

Q. In what capacity? A. Vice-President.

Q. And in 1926, on August 1, 1926, what was your capacity?

A. Salesman.

Q. With that same Company?

A. With the same Company.

Q. Mr. Kreitmeyer, I will ask you if you will outline to the Court the transactions which occurred about August 1, 1926, with reference to the subject matter in this suit, from the very beginning of these transactions right on through. Give it in your own outline.

A. Prior to August 1, 1926, we had sold the Belleville Bank & Trust Company bonds, $2,000 Kentawka Drainage District in Neshoba County, Mississippi, and $3,000 Beaver Dam Drainage District in Arkansas. Those bonds matured on August 1, 1926.

Q. Do you know when you sold them those bonds?

A. In 1918 and 1920, the Belleville Bank & Trust Company sent us those bonds for collection. As they were payable to the Bank at St. Louis, we presented them at the Bank for payment, and there were not funds for the pay-

[fol. 60] ment of the bonds by these paying agents. We so notified the Belleville Bank & Trust Company, particularly Mr. Nick Wuller, who was cashier. Mr. Wuller requested us and asked us if we would give him a note, which was accommodation paper, to cover the bonds, which we did. At the same time we had the Belleville Bank & Trust Company to sign an agreement that they would not call these bonds, and any moneys paid to them that might be [call] interest would be refunded.

The Court: You called those "bonds." You mean "notes?" A. I mean notes.

Q. Subsequent to that time did they ever call that paper or make any effort to call it?

A. At no time have we had demand on this paper by the Belleville Bank & Trust Company.

Q. And at all times thereafter did you treat that purely as accommodation paper? A. We did.

Q. Did the Belleville Bank & Trust Company ever ask you to give them renewal notes? A. They did.

Q. Did you give them to them? A. We did.

Q. This note of January 1, 1933, was that the last such note you gave to them?

A. That is the last renewal note we gave them.

[fol. 61] Q. Did you ever demand that note be returned to you? A. We did.

Q. Tell the Court when you did that.

A. Sometime prior to the time the Bank closed: I think it was about three times Mr. Duhme and I went over to Belleville and made a demand for the moneys paid them, and also for the return of the notes. Mr. George Wuller, who succeeded his father as cashier, told us that he would take it up with his directors, and each time after the first time, which first time I judge was about 1930. The latter part of 1935 he told us he didn't have time or hadn't got to it, and no action was taken on it up to the time the Bank failed.

Q. Now, at the time that these notes were executed by the defendant corporation, did any consideration pass from the Belleville Bank to the D'Oench, Duhme Company, Incorporated? A. None.

Q. And has any consideration passed from the Bank to the D'Oench, Duhme Company at any time since?

A. None whatever.

Q. Where did you have this conversation with Mr. Nick Wuller with reference to the execution of these notes?

A. The principal conversation was over the telephone.

Q. And that was right after—

A. After we had notified them the bonds wouldn't be [fol. 62] paid.

Q. At that time Mr. Wuller asked you to execute these notes, on the phone, and you told him you would? Is that correct? A. He did.

Q. Where were those notes prepared?

A. In our office.

Q. Do you know where you got the note forms that you executed?

A. No, sir; I do not. It is forms we have around the office. We always have note forms in the office.

Q. Do you know where those notes said they were payable?

A. At our office.

Q. At your office? A. Yes, sir.

Q. In St. Louis, Missouri?

A. St. Louis, Missouri.

Q. Will you tell the Court why there were two notes, one for $2,000, and one for $3,000?

A. It covered the amount of the various issue of bonds. One lot of bonds were 2,000 and the other lot 3,000.

Q. And you made a note to cover each particular issue of bonds?

A. Issue of bonds; yes, sir.

Q. Now at the time—I believe you already testified to this, but to be sure—At the time Mr. Wuller asked you to [fol. 63] give him these notes, did he tell you that this was to be an accommodation to the Bank?

A. He didn't say whether it would be an accommodation or otherwise. He just asked us to give these notes, and we assumed that he was going to consider it as an accommodation paper, or he wouldn't sign the agreement.

Q. Did he tell you they would never call on you for payment of them?

A. He did. That is why we had it put in the agreement.

Mr. O'Herin: I ask that be stricken. You can't vary the written instrument by parol testimony.

The Court: Yes, sir; the instrument will show for itself. That will be understood.

Q. I will ask you if defendant's Exhibits "A" and "B" are the instruments which you received at the time of the execution of these two notes? A. They are.

Q. And they recite that the notes will not be called for payment? A. They do.

Mr. O'Herin: Object to the relevancy and competency of these two instruments.

The Court: I assume, Mr. O'Herin, that at the conclusion of the trial you intend to go into the legal question

probably by authorities; so I am not asking you now just what the theory of your objection is.

[fol. 64] (At this point a few words were spoken off the record.)

The Court: All right; go ahead; that will be fine.

Q. Now, at the time these bonds were sold to the Belleville Bank & Trust Company, did D'Oench, Duhme Company give any guaranty concerning the payment of these bonds?

A. D'Oench, Duhme Company have never guaranteed any securities we have sold, and we would not [guaranty] Government bonds we sold.

Q. Did you [guaranty] these particular bonds?

A. We did not [guaranty] these bonds; never at any time.

Q. Never at any time? A. No, sir; not at any time.

Q. When Mr. Wuller requested you to give him these accommodation notes, did he suggest at that time that you were liable for these bonds that you sold to him?

A. He did not.

Q. Did D'Oench, Duhme Company at any time, from the time of the execution of these notes, and subsequent thereto, ever owe any money to the Belleville Bank & Trust Company?

A. Not that I recall.

Q. Do you know whether any officer of the Company owed any money to them?

A. Not that I know of.

Q. Do they own any stock of the Belleville Bank & Trust Company? A. No, sir.

[fol. 65] Q. Did D'Oench, Duhme Company ever request an extension of time in connection with these notes?

A. We did not.

Mr. Giesecke: I think that is all.

Cross-Examination.

By Mr. O'Herin:

Q. Do you recall, Mr. Kreitmeyer, about how many sales you made to the Belleville Bank & Trust Company of securities of any kind after August 1, 1926?

A. No, sir; I do not.

Q. Did you sell them any? A. Yes, sir.

Q. Prior to 1918, I believe that is when you sold them the first one of these bonds?

A. I think it is.

Q. They had been a customer of yours for how long?

A. I would say maybe a year or a year and a half.

Q. And at that time you were engaged in selling securities? A. I was.

Q. And they were in your territory? A. Yes, sir.

Q. And became one of your customers? Isn't that right?

A. They did.

Q. Became a rather valuable customer, didn't they?

A. I sold them quite a few securities.

Q. How often would you call on them when you would make the rounds over there?

[fol. 66] A. I generally went to Belleville every Monday, and called on them every time I went there.

Q. Every Monday you would call on them at Belleville?

A. Yes, sir.

Q. Now, these bonds that you sold them, the interest coupons were honored, I believe, up until August 1, 1926?

A. They were.

Q. Do you know whether or not they were honored by the paying agent for the Drainage District who executed the bonds? A. They were.

Q. D'Oench, Duhme Company did not advance any of that? A. We didn't pay any interest.

Q. Now then, the bonds matured August 1, 1926. As I understand you, the Bank sent them over to you people to present them for payment to the Paying Agent? Is that true? A. That is right.

Q. And you presented them and found out that there were no funds available? A. That is right.

Q. Now then, Mr. Wuller as I understand it, then asked you to execute two notes which have been attached to your answer here? A. That is correct.

Q. One for $3,000 and one for $2,000. What did he tell [fol. 67] you he wanted those notes for?

A. I don't recall what he told me he wanted them for. I know he did not want any past due paper in the Bank.

Q. How do you know he didn't want any past due paper? A. Because he has often said that to me.

Q. Didn't he tell you that when you executed these notes? A. He may have.

Q. Well, now, you remember when your deposition was taken in this case, just last October 19th, don't you?

A. Yes, sir.

Q. And you remember this question being asked you? "Q. How did you come to execute those two notes?" "A. Those bonds were sent over for collection; they were presented to the Bank for collection, and the funds were not available, and a few days after the first—" "Q. (Interrupting) That is the first of August, 1926?" "A. Yes, sir. A few days after that Mr. Wuller suggested that we issue a note to the Bank, which would enable him to carry this note and not show any past due paper". Does that refresh your recollection any? A. Yes, sir; it does.

Q. He did say that when you executed the note?

A. If I stated that in my deposition that is what he said.

Q. You remember when your deposition was taken?

A. Yes, sir.

[fol. 68] Q. It was just taken a month ago?

A. Sure; you have the advantage, you can read what I said.

Q. You can read it and see.

A. I assume you are reading what is in there.

Q. Well, look and see if it doesn't say in the middle of the page (handing deposition to the witness).

(No reply)

Q. Now, when Mr. Wuller said that to you, you knew what he meant by that, of course, did you not?

A. Sure.

Q. He didn't want any past due assets in that bank. He didn't want any soured bonds, if you will pardon the vernacular, to show in the assets of the Bank, because the Examiner would come around and examine the bank and might raise some question about it? Isn't that true?

A. I don't know what Mr. Wuller thought.

Q. You had had considerable experience in the business of investment securities prior to that time?

A. I have been in the investment business since 1910.

Q. Since 1910? So you had been in the investment business sixteen years when this happened?

A. That is right.

Q. And when the executive officer of this Bank asked you to sign a note for the reason that it would enable him to carry your note and show no past due paper, you knew [fol. 69] what he meant by that, did you not?

A. I am not assuming what he meant or what he was thinking about. I don't know.

Q. Assuming you didn't know what he meant by it, what did you understand by it as an investment man?

A. I assumed that he didn't want past due paper in his bank.

Q. Now then, you knew, of course, this bank was subject to periodic examination by the State Bank Examiner, didn't you? A. Yes, sir; I did.

Q. And you knew that if the State Bank Examiner came around there and saw in the records of that bank among the assets D'Oench, Duhme Company's notes for $2,000 and $3,000 each, respectively, secured by certain bonds as collateral, that it would look all right to him, did you not?

A. No, sir; I didn't know that.

Q. You didn't know what?

A. That the examiner would think the note was all right.

Q. Well, you knew this, you had sufficient experience to know when he saw that in there that it would not show on its face to be something that was past due like the bonds they were supplemented by, did you not?

A. If the Bank Examiner saw the examination was suf- [fol. 70] ficient and saw the bonds were past due and would make inquiries about the note?

Q. I am asking you if you didn't know that this note, coming into the assets of the bank, would show an asset there for the examiner which in fact the Bank did not have?

A. I didn't know that. I am in no position to know what the bank examiner might think.

Q. I am not asking what the bank examiner might think, I am asking you as a man who prior to that time had had sixteen years' experience in the investment security business, if you didn't know as a fact that is what would be the result of the action in signing those two notes?

A. I am not going to assume that at all. That would be an assumption on my part trying to come to a conclusion what a bank examiner might think, and I have never been a bank examiner.

Q. Assuming if you will, for lack of a better term, for the [same] of the argument then, that you are an expert, I will ask you as an expert then to give your conclusion of what you thought about it?

A. I am not an expert. I refuse to answer as an expert. I am not an expert.

Q. Well, do you refuse to answer that question?

Mr. Giesecke: Let's have the question clarified, please, Your Honor.

[fol. 71] Mr. O'Herin: I will clarify that again.

Q. You are a man that had sixteen years' experience in the investment security business, and a banker comes to you with two past due bonds that you sold the bank, and he says, "I want you to execute $5,000 worth of notes for me so I won't have any past due paper down in my bank." Do I understand you to say you would not understand what was meant by that statement of what the effect of your permitting your notes to be put in the bank would be?

A. If the banker had $2,000 worth of notes and asked me to sign $2,000 past due bonds, and asked me to sign a $5,000 note, I would think he was crazy.

Q. If what?

A. If a banker had $2,000 and asked me to sign a note for $5,000, which you just stated, I would think he was crazy.

Q. Assuming—I may have slipped—assume he had $2,000 worth of bonds that you had sold the bank, that by the due date they were past due, and had $3,000 worth of bonds in addition to that, making a total of $5,000, and he came to you and asked you to sign a note so he would not have any past due assets shown in the bank, would you still think he was crazy? A. No, sir.

Q. Why did you do it? A. Why did we do it?

Q. Yes, sir; why did you execute $5,000 worth of notes [fol. 72] when you came over here, when you found out there was not any pay-off on the bonds?

A. It was an accommodation to the Belleville Bank & Trust Company.

Q. Why did you want to accommodate them?

A. Why did I want to accommodate them?

Q. Yes, sir. A. Because they asked us to.

Q. Did you have any other reason?

A. None whatever.

Q. You knew when you executed those notes they might be negotiated by that bank?

A. I didn't know anything of the sort.

Q. Don't you know a promissory note can be negotiated?

A. With that agreement that they have signed they can hardly be negotiated.

Q. Was this agreement attached to the notes that were left with the bank?

A. No, sir; they wouldn't do us any good leaving those with the bank.

Q. You took those notes and had them in your possession, these two—I say "notes", I mean "memorandums" Defendant's Exhibits "A" and "B"—you had them in your possession all the time?

A. Sure; that is where they belonged. They were protecting us.

[fol. 73] Q. They were never attached to the note to protect anybody to whom the note might be transferred?

A. It would be no good to us to have them attached to the note.

Mr. O'Herin: That is a question of law. You may be surprised at the ultimate answer to that, as to whether or not they were attached to the note.

Q. These Exhibits "A" and "B" have always been in the possession of D'Oench, Duhme Company?

A. Yes, sir.

Q. And they were not in the Belleville Bank & Trust Company at any time, subsequent to the execution, I mean, in their possession?

A. The Belleville Bank & Trust Company had copies. I left them with Mr. Heineman when he signed the agreements.

Q. August 4, 1926?

A. At about that time; yes, sir.
Q. I mean whatever date this is? A. Yes, sir.
Q. You didn't subsequently give them?
A. No, sir.
Q. Whatever this is, they made a carbon copy and they retained it?
A. They retained the carbon copy, and signed the original.
Q. And the signed original they gave to you?
A. Yes, sir.
[fol. 74] Q. Now, further on over in your deposition, page 11, the question, just so it will be an explanation: "Q. Do you know what information was given by either of the paying agents with respect to when they might be paid off?" "A. Very evidently there were not any funds available." "Q. And you reported that back to Mr. Wuller, and that is the time he told you that he would like to have D'Oench, Duhme Company execute these two notes?" "A. Yes, sir." "Q. So that his records would not show any past due bonds in the bank?" "A. That is right." "Q. You understood what he meant by that, I assume?" "A. Absolutely." You remember that, don't you?

Mr. Giesecke: Your Honor please, he testified to exactly the same thing here just a few minutes ago.

Mr. O'Herin: He said, No, he didn't understand.

Mr. Giesecke: He said he wouldn't conclude what was in Mr. Wuller's mind.

Mr. O'Herin: I asked him about his own conclusion afterwards.

The Court: He may answer.

(To which ruling of the Court the defendant by its Counsel then and there at the time duly excepted.)

By Mr. O'Herin:
Q. You testified like that, didn't you?
A. Yes, sir. You say that is in my deposition. I must have testified that way or it wouldn't be there.
[fol. 75] Q. Now then, the first notes you ever executed

were August 1, 1926? Those are the two notes attached to the answer. Is that correct? A. Yes, sir.

Q. Now then, subsequent to that do you know whether or not there were any renewals of these two notes prior to the execution of this $5,000 note?

A. That I can't say. I do know that is a renewal note that you have in the possession of the F. D. I. C.

Q. It is written right here. Somebody wrote "renewal" on it.

A. It is George Wuller's writing, for your information.

Q. Right here? A. Yes, sir.

Q. When the original two notes were executed, which are these that are attached to your answer, that were marked Exhibits "A" and "B" to the Company's answer in this case, they are signed by whom on behalf of D'Oench, Duhme Company? A. Herman Duhme.

Q. Do you know anything with respect to the details of where these were signed?

A. Yes, sir; they were signed in St. Louis in our office.

Q. And do you know how they were sent to the Belleville Bank & Trust Company? A. No; I do not.

Q. Did you mail them over there yourself?

[fol. 76] A. That was not in my province.

Q. You would not handle that?

A. I didn't have that part of the business. I was only a salesman at that time.

Q. Now then, subsequently, when you went over there to see Mr. Wuller, that is the son of the man you had the original transaction with, and demanded, I believe you said, to get this note back and get some money back—

A. What is that question again?

Mr. O'Herin: I will withdraw that. I will ask something else before I get up to that.

Q. Now, then, after the execution of these notes on August 1, 1926, D'Oench, Duhme Company subsequently paid the Belleville Bank & Trust Company 1600 and some odd dollars, didn't they, interest on these notes?

A. You might consider it interest. We paid that amount to them.

Q. Have you a record of the exact amount here with you? A. No, sir; I have not. It is in the deposition.

Q. The amount in the deposition is $1,601.56.

The Court: Paid by whom?

Mr. O'Herin: D'Oench, Duhme Company to the Belleville Bank & Trust Company.

Q. That was paid from August, 1926, up until about March, 1932, isn't that correct?

[fol. 77] A. I think that is correct.

Q. And on the records of the D'Oench, Duhme, Incorporated, you entered those payments as interest payments, did you not?

A. We did because we couldn't handle them any other way.

Q. I don't know what your reason was, but you did do that?

A. They had to be charged to something, and that was the only account they could be charged to.

Q. You charged that on your books as interest on these notes? Isn't that correct? A. I think that is correct.

Q. Now then, subsequently when you went over there to see—is it George Wuller? A. George Wuller.

Q. And you asked him about giving this money back because you didn't owe it to them because these were merely accommodation notes, he told you at that time that that money had been intermingled with the earnings of the bank, didn't he? A. He did.

Q. And that it was a rather difficult matter and he would have to take it up with the other officers and the Board of Directors? A. That is true.

Q. That is what he told you?

A. That is what he told us.

[fol. 78] Q. And you subsequently I think made perhaps two more demands on him, but you never did eventually get any satisfaction?

A. Although we made about three demands.

Q. Did he ever reiterate that statement to you about this money having gone into the earnings of the Bank?

A. He did, and said he had not gotten to it to take it up with the directors and officers.

The Court: Was the arrangement you would pay interest and the bank would repay that interest?

The Witness: Pardon me.

The Court: Was the arrangement, you would pay the Bank interest on the notes, and the Bank turn around and pay it back to you?

A. Absolutely. It is recited here in the agreement.

The Court: I notice the language in the statement, but I did not take it so literal.

Mr. O'Herin: Now, why did you make those interest payments on that note?

A. I don't know. That was not my department. I was a salesman at the time.

The Court: I expect we had better recess until 8 o'clock.

Whereupon, at 6:15 P. M., November 20, 1939, a recess was announced until 8:00 P. M., after which the proceedings continued as follows:

[fol. 79] By Mr. O'Herin:

Q. Now Mr. Kreitmeyer, you became an officer of the Company, did you not, in May, 1926?

A. About that time.

Q. And what office was it that you held?

A. Secretary.

Q. And subsequent to that time you were secretary of the Company at all times down until what time?

A. January, 1939.

Q. And since that time you have occupied what office?

A. Vice President.

Q. And you are vice-president at the present time? Is that correct? A. That is correct.

Q. The $2,000 worth of Kentawka Drainage District bonds—

The Witness: That deposition has a lot of mistakes in it.

Mr. O'Herin: Since you say it has a lot of mistakes, point out to His Honor about where those mistakes are.

Mr. Giesecke: You have covered part of that, haven't you?

A. Yes, sir.

Mr. O'Herin: Down to what point? And I will look at the corrections afterwards.

A. I corrected one copy of it. I don't know why you didn't get it.

Mr. O'Herin: Let me have the corrected copy, then.

(At this point occurred a short discussion off the record.)

[fol. 80] By Mr. O'Herin:

Q. You didn't have any reference to its being incorrect as to any of these questions I asked you about before we recessed for dinner, did you? A. No.

Q. According to the memorandum that you had at the time your deposition was taken the Kentawka bonds were purchased by the Belleville Bank & Trust Company on December 11, 1918, at a price of 101.536, and the Beaver Dam Drainage District bonds were purchased October 15, 1920, at 99 and interest. Does that refresh your recollection if that is correct? A. Yes, sir.

Q. As I understand, at the time you sold those bonds to the Belleville Bank & Trust Company, in your direct examination you say you had no agreement with them whatsoever that you would guarantee the payment of those bonds in the event they were not paid at maturity?

A. We never have guaranteed anything that we sold.

Q. Now then, at the time that the two notes were executed, August 1, 1926, did Mr. Wuller agree with you that when the bonds were to be paid to your company that the payment of the bonds would offset the note?

Mr. Giesecke: You say when the bonds were to be paid to the D'Oench, Duhme Company.

Mr. O'Herin: He said when the bonds were to be paid [fol. 81] to us he agreed the bonds would offset the notes.

The Witness: That was one of the mistakes I think that was to be corrected.

By Mr. O'Herin:

Q. As a matter of fact, these bonds were sent by the Belleville Bank & Trust Company over to your company for collection on August 1, 1926, isn't that true?

A. At that time or a few days prior.

Q. And you at that time presented one of them to the Lafayette South Side Bank and the other to the National Bank of Commerce, who were the paying agents and both advised you they had no funds to pay? A. Yes, sir.

Q. In your deposition you testified that Mr. Wuller at the time those notes were executed agreed with you that when the bonds would be paid that that payment would offset that note? Is that correct?

A. That is true, they would receive the payment and naturally it would be credited against that piece of paper that he gave them.

Q. Now then, subsequent to August 1, 1926, did you continue that volume of business with the Belleville Bank & Trust Company? Did it continue to be as much as it was prior to that time?

A. I can't say that. I haven't the records in front of me.

[fol. 82] Q. Would you have any recollection on that at all?

A. I continued to do business with him. I couldn't tell you about the volume.

Q. Did that have anything to do with the execution of these notes?

A. Absolutely not. We never buy any account from any one.

Q. What?

A. We never buy any account from anyone. That would be purchasing that man's business, which we never did and never intended to do.

Q. Now, at the time this note of January 1, 1933, was executed, Mr. Wuller told you at that time that the other note or notes had become too old, did he not?

A. If I recall, that is what he said.

Q. And it was at that time that you executed the new note, this last note?

A. He asked us to start with a new note. We didn't ask for a renewal of it.

Q. No; I didn't say you did. He asked for it because the old note was getting too old in the records of the bank?

A. I assume that is what he wanted.

Q. Now then, this interest, these payments that were made of 1600 some odd dollars, I believe that you testified

in your deposition they were requested by the Belleville Bank & Trust Company so as to keep this a live piece of paper? Is that correct?

[fol. 83] A. That is correct.

Q. And you knew that while the payments were being made? A. Yes, sir.

Q. And you were aware at the time that these payments were being made from time to time, were you not?

A. I wasn't positive of it, whether that was made by the cashier or a cashier's deposit.

Q. Now then, at the time that these bonds fell due, Mr. Kreitmeyer, the Belleville Bank & Trust Company sent them over here to D'Oench, Duhme Company to be presented for collection, did you at that time make any agreement with them to take those bonds back?

A. Mr. O'Herin, I have told you twice that we don't guarantee anything, and that would be guaranteeing those bonds.

Q. Well then, why did you then pledge bonds that already belonged to the Bank as collateral security for these two notes if you didn't have any deal whereby the Bank transferred them back to you or you took title to them?

A. Because Mr. Wuller asked us to.

Q. And that was the only significance of the fact that they are pledged as collateral security under these two notes?

A. There is no other reason whatsoever.

Q. You of course at no time ever notified anyone other than the officers of the Belleville Bank & Trust Company [fol. 84] that this was, as you call it, an accommodation note, did you? A. No, sir.

Q. Never notified any of the State Banking authorities or Bank Examiner?

A. I had no occasion.

Q. That was not done, in any event? A. No, sir.

Q. Nor the Federal Deposit Insurance Corporation was not given any notice with respect thereto by your Company until after they had made a demand for payment? Isn't that correct?

A. That is correct.

Mr. O'Herin: That is all.

Redirect Examination.

By Mr. Giesecke:

Q. Mr. Kreitmeyer, were you ever asked by anyone whether this was an accommodation note? A. No.

Q. Were you ever asked by anyone why you didn't pay this note? A. No, sir.

Q. Did any State Banking Examiner or any other Bank authorities, including the examiners for the Federal Deposit Insurance Corporation, ever call upon you or the Company and ask if this was an obligation of the Company?

A. No, sir.

Q. And that is true from the period 1933 to 1938?

[fol. 85] A. That is true.

Mr. Giesecke: I think that is all.

Herman Duhme, of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination.

By Mr. Giesecke:

Q. Please state your name. A. Herman Duhme.

Q. You are connected with D'Oench, Duhme Company, [defendany] in this case? A. Yes, sir.

Q. You were in 1926? A. Yes, sir.

Q. Mr. Duhme, you executed the two original notes, referred to herein, is that correct? A. Yes, sir.

Q. At the time were you familiar with the transaction?

A. I was familiar with it to the extent I knew they had these five bonds.

Q. That they had these five bonds?

A. That we had sold the five bonds.

Q. To the Belleville Bank & Trust Company?

A. To the Belleville Bank & Trust Company.

Q. And at the time you executed those notes were you aware of the fact that they were accommodation notes?

A. Yes, sir.

Q. Did any consideration move from the Belleville Bank [fol. 86] & Trust Company to the D'Oench, Duhme Company, Incorporated, for the execution of these notes?

A. No, sir.

Q. None whatsoever? A. No, sir.

Q. Has any moved at any time since from the Bank to the defendant corporation? A. No, sir.

Q. Did D'Oench, Duhme Company to your knowledge ever guarantee the payment of these bonds which were

sold in 1918 and 1920 to the Belleville Bank & Trust Company? A. No, sir.

Mr. Giesecke: I think that is all.

Cross-Examination.

By Mr. O'Herin:

Q. Mr. Duhme, in August, 1926, you were secretary of the Company I believe? Is that correct? A. Yes, sir.

Q. And you are now president? A. Yes, sir.

Q. You were vice-president in August, 1926, and you are now president?

A. I am president now.

Q. That is what I mean, you have been an officer of the Company for about twenty-two years? A. Yes, sir.

(Plaintiff's Counsel makes a brief statement off the record.)

Q. Now, at the time that you signed these notes, August [fol. 87] 1, 1926, you were aware of the purpose of the execution of these notes? A. Yes, sir.

Q. That is, as I understand it, you had no direct negotiation with Mr. Nic Wuller, but through Mr. Kreitmeyer you learned Mr. Nic Wuller had asked that you sign these notes so that the assets of the Bank would not show these past due bonds? You knew that at the time, did you not?

A. I probably knew it but—I knew of the transaction, yes, sir.

Q. I say, you knew of the transaction and you knew the reason the notes were executed by your Company through you was that Mr. Wuller did not want his records to show any past due bonds in the assets? Isn't that correct?

A. I understand that.

Q. And you knew that subsequently these payments of 1600 and some odd dollars were made to the Belleville Bank & Trust Company by your Company and were charged off on your records as interest? You were aware of that also, were you not?

A. They were charged off; I don't know that it was interest, but I knew they were charged that much amount of money.

Q. And that was paid month by month?

A. I think it was month by month. I didn't keep the books.

Q. And it was your idea that those payments were made because Nic Wuller wanted to keep that note alive, was it not?

[fol. 88] A. I understood that; yes, sir.

Q. And you know of no notification that the bank authorities of the State of Illinois ever received from your Company, or the Bank Examiners, that this note was merely an accommodation note, do you? A. I do not.

Q. And that was likewise true in respect to any notice on behalf of your Company to the Federal Deposit Insurance Corporation until at the time or subsequent to the time demand was made for payment? Is that correct.

A. Correct.

Mr. O'Herin: I believe that is all.

Redirect Examination.

By Mr. Giesecke:

Q. Did anyone ever ask you as to whether this was an accommodation note or not? A. No, sir.

Q. Did anyone ask you why the interest was not paid on it? A. No, sir.

Q. Did any State Bank Examiner or Examiner with the Federal Deposit Insurance Corporation ask you anything at all about this transaction? A. No, sir.

Mr. Giesecke: That is all.

Mr. Giesecke: That is all, Your Honor.

[fol. 89] Whereupon, the Plaintiff to further sustain the issues in its behalf offered the following evidence in rebuttal:

Mr. O'Herin: I would like at this time to introduce in evidence, if Your Honor please, the photostatic copies of defendant's exhibits which were attached to the answer filed in this case, being marked on said answer as "Defendant's Exhibit B" and "Defendant's Exhibit A". And the reporter may mark our next two exhibit numbers on there as plaintiff's exhibits in this case.

(Which said Exhibits so marked by the reporter "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7", respectively, are annexed herein below.

Mr. O'Herin: These documents have now been marked "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7", Plaintiff's Exhibit "6" being a $3,000 note of August 4, 1926, and Plaintiff's Exhibit "7" being the $2,000 note dated August 4, 1926.

PLAINTIFF'S EXHIBIT 6.

No 49-L — For Sale by Wm. J. Kennedy Stationery Co., 512 N. Fourth Street, St. Louis.

$3,000.00 — August 1, 1926. — 19__

.-.-.-.-.-.-.-.ON DEMAND.-.-.-.-.-.-.-.-.-.-.-after date WE promise to pay to the order of Belleville Bank & Trust Company, Belleville, Illinois.

.-.-.THREE THOUSAND DOLLARS AND NO CENTS.-.-.-.-.-.-.-.-.-.DOLLARS,

for value received, negotiable and payable at D'Oench, Duhme & Co.Inc. 507 Locust St., Saint Louis, Missouri with interest after maturity at the rate of 6% per cent per annum, .-WE-. having deposited or pledged with Belleville Bank & Trust Co. Illinois, as collateral security for the payment of this note .-.-.-.-.-.-.-.-.-.-.

PLAINTIFF'S EXHIBIT 7.

No. 42-L — For Sale by Wm. J. Kennedy Stationery Co., 313 N. Fourth Street, St. Louis.

$2,000.00 August 1, 1926.

-.-.-.-.-.-.-.-ON DEMAND-.-.-.-.-.-.-.-.-.-.-.-.- after date WE promise to pay to the order of Belleville Bank & Trust Company, Belleville, Illinois.

-.-.-.-TWO THOUSAND DOLLARS AND NO CENTS-.-.-.-.-.-.-.-.-.-.-.-.- DOLLARS, for value received, negotiable and payable at D'Oench, Duhme & Co.Inc.,507 Locust St., Saint Louis, Mo. with interest after maturity at the rate of (6%) per cent per annum, WE having deposited or pledged with Belleville Bank & Trust Co. Belleville, Illinois. as collateral security for the payment of this note -.-.-.-.-.-.-.-.-.-.-.-

[fol. 91] R. R. BANJAN, previously sworn, is recalled for further examination on behalf of the plaintiff.

Redirect Examination.

By Mr. O'Herin:

Q. Mr. Banjan, I show you here the two documents marked "Defendants Exhibits A and B", dated August 4, 1926, each of them, and each signed Belleville Bank & Trust Company, by Mr. Heinemann, and ask you when was the first time that you ever saw those documents?

[fol. 92] A. The first time we knew about those was when we notified D'Oench, Duhme Company of their note, and they brought these over to the Bank.

Q. Now, as far as you know, was that the first time that anyone connected with the Federal Deposit Insurance Corporation saw these or had any knowledge of them?

A. Yes, sir.

Q. Did you subsequent to that time make a search in the records and files of the Belleville Bank & Trust Company to see if you could find copies of these there?

A. Yes, sir; I searched the records of the Belleville Bank & Trust Company for copies of these two agreements.

Q. Did you find them? A. I did not.

The Court: When you say "the record" you mean what record?

A. The correspondence, and through the note ledgers and the notes also, where I thought they might be.

Mr. O'Herin: I believe that is all.

Recross Examination.

By Mr. Giesecke:

Q. Did you ever ask Mr. Wuller about those?

A. No, sir.

Q. Did you ever ask Mr. Heinemann about them?

A. I asked Mr. Heineman about them day before yesterday.

Q. That was the first time? A. Yes, sir.

[fol. 93] Q. And what did he tell you?

A. He told me he had signed those agreements. And I asked him why he signed them, and he said, "I don't know, it has been so long ago; Mr. Wuller just asked me to sign them and I signed them." That is all he would say.

Q. Did you ask him where the copies were?

A. I asked him if there were any copies. He said he didn't know where there were any copies.

Q. Did you ask the examiners for the Federal Deposit Insurance Corporation, who examined the bank's conditions in 1934, 1935, 1936 and 1937, as you testified, did you ask them about that?

A. Yes, sir; we asked Mr. Ireland about that, and he didn't know anything about them.

Q. He knew, however, the note had been charged off?

A. Yes, sir.

Q. Did he tell you why it was charged off?

A. No; I didn't ask him.

Q. Mr. Banjan, as you know, this note in Schedule B-7 was listed among the charged-off assets of the bank?

A. Yes, sir.

Q. In your opinion, and in view of the fact you are familiar with the operation of the Federal Deposit Insurance Corporation with respect to banks in this condition, in [fol. 94] your opinion do you think that the Insurance Corporation would have refused to make this loan if this note hadn't been there and just those five bonds had been there?

Mr. O'Herin: Object to that as immaterial.

The Court: I don't grasp the significance.

Mr. Giesecke: I am trying to show, under some of the cases the courts in various jurisdictions make reference to the fact whether anybody has been harmed by the transaction.

The Court: You may answer the question subject to the objection.

Q. I asked you if in your opinion as an expert—I think you said you were a bank receiver and familiar with the affairs of banks? A. Yes, sir.

Q. And you have been connected with the F. D. I. C. for some time—if in your opinion you think the Federal Deposit Insurance Corporation would have been influenced in any way not to make this loan had the charged-off assets, instead of having this $5,000 note, had instead just the five bonds? A. No, sir; I don't think so.

Q. You don't think the Federal Deposit Insurance Corporation would have been influenced in that situation?

A. No, sir; because they had already insured the deposits and it had to pay them all. They insured all the deposits, and when they do that they would have to check [fol. 95] what assets there were when they paid off the deposit liability.

Mr. Giesecke: I think that is all.

W. J. STAPLETON, previously sworn, recalled for further examination on the part of plaintiff, testified as follows:

Redirect Examination.

By Mr. O'Herin:

Q. Mr. Stapleton, Mr. Nic Wuller, who has been referred to in this testimony here today, and who was cashier of that bank, is now dead, is he not?

A. Yes, sir.

Q. Do you know how long he has been dead?

A. No; I do not.

Mr. O'Herin: May we agree that he died in 1929?

Mr. Giesecke: That is all right with me.

Mr. O'Herin: I just want the record to show he is dead.

A. I know he is dead, but I don't know when he died.

Q. He was succeeded by Mr. George Wuller, who was cashier of the bank at the time the demand was made by D'Oench, Duhme Company that the 1600 some odd dollars, which had been paid to the bank, be returned. Do you know his whereabouts at this time?

A. He is in the Federal penitentiary at Lewisburg, Pennsylvania.

[fol. 96] Q. When was the first time that you had any knowledge of the existence of Defendant's Exhibits "A" and "B", which are the letters signed by Mr. Heinemann?

A. When demand was made on D'Oench, Duhme Company for the note, Mr. Kreitmeyer and Mr. Duhme came over and presented these memorandums of agreement.

Q. Now then, some reference has been made in this testimony to the fact that the Federal Deposit Insurance Corporation had insurance deposits of the Belleville Bank & Trust Company up to a limit of $5,000, I believe for each account, in the loan that was made by the F. D. I. C. to that

bank and the agreements that were entered thereunder. Is that an entirely separate transaction from the original insurance agreement or not? A. Oh, yes, sir.

Q. In other words, what I am getting at is this: The Federal Deposit Insurance Corporation in the liquidation of the Belleville Bank & Trust Company is not proceeding under any insuring agreement that it may have had at that bank? A. No, sir; that is a separate agreement.

Q. Which is explained by the documentary evidence, the application for loan, and so forth? A. Yes, sir.

Mr. O'Herin: I believe that is all.

[fol. 97] Recross Examination.

By Mr. Giesecke:

Q. Mr. Stapleton, it is true, however, is it not, when the bank closed the Federal Deposit Insurance Corporation became liable for the deposits which it had insured?

A. Yes, sir.

Q. And this was just its own chosen way of working that liability out? A. Yes, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: One other thing. Can it be agreed that whatever these prices were at which the bonds were originally sold to the Belleville Bank & Trust Company, that that price was paid to D'Oench, Duhme Company?

Mr. Giesecke: Oh, yes, sir.

Mr. O'Herin: That is correct, isn't it? I think I forgot to ask that, Mr. Kreitmeyer.

Mr. O'Herin: I believe that is all, Your Honor.

Mr. Giesecke: If it is agreeable, I think I will put these notes in evidence.

Mr. O'Herin: Sure.

(Which said notes are omitted as per stipulation, being same as Defts. exhibits C & D.)

The Court: May I have the points and authorities in ten [fol. 98] days?

Mr. O'Herin: I will be glad to, Your Honor, and at the same time we will submit to you a list of authorities.

The Court: (addressing the reporter) Make a transcript of this testimony. If you need an order the record will show a request by the Court for a transcript. And may I have that transcript within ten days?

Mr. O'Herin: Do you want both memorandums in ten days?

The Court: You handle that as most convenient to yourselves, but one of you prepare your brief, or the plaintiff of course, naturally, and submit it to Mr. Giesecke and let him have time to answer, and you reply. I do not mean by "brief", gentlemen, that I care for a laboriously prepared brief because I do not want to put you to all that labor. I am very anxious, however, to have a statement of the points as you prepare them in a brief in the Supreme Court or elsewhere, the points and authorities, and any informal suggestions that you may care to add by way of explanation or argument; but the points and authorities is really what I am concerned about, because I confess that I will need your help.

Mr. O'Herin: I took the liberty to suggest to Mr. Giesecke just now, but I seem to have a different idea than the Court. It is true I represent the plaintiff in this case and [fol. 99] I guess the burden of proof is on me, but I told him, I make a prima facie case and you come in and knock me into a cocked hat. I believe the defense ought to file the first brief.

The Court: You gentlemen do that as you like.

The Court: You may recess indefinitely.

Whereupon, at 9:50 P. M., November 20, 1939, an indefinite recess was announced.

[fol. 100] (Docket Entry of Filing of Findings of Fact and Conclusions of Law and Decree.)

January 8, 1940.

Court's findings of fact and conclusions of law and decree in accordance therewith filed and entered, finding issues in

favor of plaintiff and against defendant and awarding plaintiff judgment in the sum of $5000.00 with interest thereon at the rate of 6% per annum from May 1st, 1933, to date, amounting to $1705.83, and ten per cent additional on principal and interest as attorneys fees amount to $670.58, making an aggregate judgment in the sum of $7376.41 and costs.

[fol. 101] (Findings of Fact and Conclusions of Law, etc.)

Filed January 8, 1940.

In The United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. 3.

D'Oench Duhme & Co., Inc., a corporation, Defendant.

Findings of Fact.

1. Plaintiff Federal Deposit Insurance Corporation is a corporation duly organized and existing under and by virtue of an Act of Congress of the United States; the defendant D'Oench Duhme & Co., Inc. is a corporation organized and existing under and by virtue of the laws of the State of Missouri and has its principal office and place of business in the City of St. Louis, Missouri;

This action arises under the laws of the United States and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. Defendant executed a certain promissory note (Plaintiff's Exhibit 1) here sued on dated Belleville, Ilinois, January 1, 1933, payable on demand to Belleville Bank and Trust Company, a banking Corporation of the State of Illinois, in the principal amount of $5000.00, bearing interest from date at the rate of 6% per annum, payable semi-annually and providing for ten per cent additional on the principal and interest as attorney's fees in case the said note and interest were not paid when due and was placed in the hands of an attorney for collection. Protest, presentation and notice were by the terms of the note

waived and it was payable at the office of Belleville Bank and Trust Company at Belleville, Illinois.

[fol. 102] 3. On or about April 2nd, 1938 the Belleville Bank & Trust Company executed an application to plaintiff company for a loan to be evidenced by the Bank's note attached to said application and secured by certain collateral described in an attached exhibit which included the note here sued on. By the terms of said application Belleville Bank & Trust Co. agreed to sell certain other of its assets to the First National Bank of Belleville located at Belleville, Illinois in consideration of the assumption by that Bank of the deposit liabilities of the Belleville Bank & Trust Company amounting to $2,795,130.55 and agreed that the proceeds of the loan applied for would be paid over to the First National Bank of Belleville to be applied toward payment of said deposit liabilities. In accordance with the said application, plaintiff on or about April 4, 1938 loaned the Belleville Bank & Trust Company the sum of $1,349,558.07 evidenced by said Bank's demand note in that amount of same date, payable to plaintiff and plaintiff received as security collateral referred to in the loan application including the note here sued on.

4. On the above date this note (Plaintiff's Exhibit 1) was at Belleville, Illinois endorsed without recourse by Belleville Bank & Trust Company to the order of plaintiff and said note was at said time and place delivered to plaintiff. The entire amount of the aforesaid loan of $1,349,558.07 was paid over to the First National Bank of Belleville to be applied toward payment of the deposit liabilities of Belleville Bank & Trust Co. in accordance with the application agreement. The note from Belleville Bank & Trust Co. to plaintiff, among other things, provided that upon non-payment of said note when due, plaintiff was empowered to collect in its own name all collateral securing said note. Demand for payment of said note was made by plaintiff in April, 1938 and same became due and was unpaid. Thereafter in August, 1938 plaintiff made demand on defendant for payment of defendant's note (Plaintiff's Exhibit 1) and payment was refused.

[fol. 103] 5. Defendant contends that the note in suit was given without consideration and was a renewal note of one

of a series of renewal notes given by defendant and that the original notes dated August 1st, 1926 in the respective amounts of $2000 and $3000 were given without consideration. Defendant was engaged in the investment security business and for about a year and a half prior to 1918 the Belleville Bank & Trust Co. had been a customer of defendant and during the ensuing years defendant had sold the Bank quite a few securities and a sales representative of defendant would call on the Bank once a week.

6. The evidence shows that prior to August 1st, 1926 defendant sold to Belleville Bank & Trust Company $2000 Kentawka Drainage District Bonds of Neshoba County, Mississippi and $3000 Beaver Dam Drainage District Bonds of Green and Randolph Counties, Arkansas, the first sale being in 1918 and the second in 1920. These bonds matured August 1, 1926. On maturity the Bank forwarded the bonds to defendant Company to be presented for payment to the paying agents and they were dishonored by reason of no funds. Defendant so advised the Bank and the Cashier of the Bank then requested defendant to execute two notes payable to the Bank in the respective amounts of $2000 and $3000 which would enable the Bank to carry the notes and not show any past due bonds in the Bank. The representative of defendant Company who handled these negotiations had sixteen years' experience in the investment and security business and he testified that he understood the meaning of the statements of the Bank Officer.

7. Defendant then executed two collateral demand notes each dated August 1, 1926, payable to the Belleville Bank & Trust Company. One of these notes (Plaintiff's Exhibit 7) was for $2000 bearing 6% interest from date and in the [fol. 104] collateral agreement defendant pledged as security therefor the $2000 Kentawka Drainage District Bonds heretofore mentioned. The other note was for $3000 bearing 5½% interest from date and in the collateral agreement of said note the defendant pledged as security the hereinabove mentioned $3000 Beaver Dam Drainage District Bonds.

8. Under date of August 4, 1926 the Belleville Bank & Trust Company by its Assistant Cashier acknowledged re-

ceipt in writing of these two demand notes. These receipts, omitting date and signature, are as follows:

Defendant's Exhibit A.

"Received from D'Oench, Duhme & Co., Inc..... Their Demand Note for $2,000.00, dated August 1st, 1926, to be held as security on $2,000.00 Kentawka Drainage District, Neshoba County, Mississippi 6% bonds, due August 1st, 1926, Nos. 9 and 10, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid."

Defendant's Exhibit B.

"Received from D'Oench, Duhme & Co., Inc..... Their Demand Note for $3,000.00, dated August 1st, 1926, to be held as security on $3,000.00 Beaver Dam Drainage District, Greene and Randolph Counties, Arkansas 5½% bonds, due August 1st, 1926, Nos. 3, 4 and 5, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid."

These receipts were not attached to the notes but were delivered to defendant and kept in its possession at all times since.

9. Plaintiff or its representatives had no knowledge of the existence of Defendant's Exhibits A and B until after demand was made on defendant for payment of the note in suit in August, 1938, when representatives of the defendant Company presented them to Mr. Stapleton of the Federal Deposit Insurance Corporation. Thereafter plaintiff's representatives made a search in the correspondence files, note ledgers and notes of the Belleville Bank & [fol. 105] Trust Company, but were unable to find any copies of these receipts therein.

10. At the time of the execution of these notes it was agreed that when the bonds pledged as collateral thereto would be paid, then that payment would be credited against the above notes that defendant Company gave the Bank.

11. From August, 1926 until March, 1932 defendant Company paid to Belleville Bank & Trust Company the

total sum of $1601.56, which payments were entered in the books of the defendant Company as interest payments on the aforesaid notes dated August 1, 1926, and this money when received was intermingled with the general earnings of the Belleville Bank & Trust Company. The testimony of defendant's officers was that these interest payments were made so as to keep the two notes as live paper. These two notes, Plaintiff's Exhibits 6 and 7, were paid by renewal notes at which time these original notes were delivered to defendant. Each note bears the notation, "Paid July 23rd, 1928 by renewal".

12. It appears that one or more renewal notes were given prior to the execution of the note here in suit, but the renewal note or notes executed in payment of the original notes, on July 23, 1928 were not available at the trial nor were any additional renewal notes if such there were. At the time of the execution of the note in suit on or about January 1, 1933, a representative of the Bank requested defendant to execute a new note as the other note or notes had become too old and in compliance with the request the present note, "Plaintiff's Exhibit 1," was signed. This note likewise contained a pledge of collateral agreement and the defendant Company as pledgor pledged as collateral for the note the same bonds which were pledged as security for the original notes dated August 1, 1926.

[fol. 106] 13. At the time of the original sale of these bonds by defendant, Belleville Bank & Trust Company purchased the Kentawka Bonds at a price of $101.536 and the Beaver Dam Drainage Distrıct Bonds at $99. and interest.

14. On July 30th, 1937 Belleville Bank & Trust Company sold the Kentawka Drainage District bonds for $100.00 and plaintiff has credited this amount to interest due on defendant's note. This credit paid interest to May 1st, 1933. No other payment has been made thereon.

15. Defendant's note was among the charged off assets of Belleville Bank & Trust Company which were conveyed to plaintiff, having been so charged off July 29th, 1935.

16. Nick Wuller, who was Cashier of Belleville Bank & Trust Company and with whom the transactions were had concerning the sale of the bonds and the execution of

the notes in 1926, is dead. Plaintiff had no notice of any contention that defendant's note was given without consideration until after it had demanded payment of defendant in August, 1938.

17. Herman Duhme, who was President of defendant Company at the time of trial and who signed the notes of August 1st, 1926 on behalf of defendant, and who at that time was defendant's Vice-President, and prior thereto had been an officer of the Company for approximately nine years, knew that those notes were executed for the reason that the Bank did not want any past due bonds in its assets and knew of the subsequent payment by defendant of the $1601.56 to the Bank and that the purpose of these payments was to keep the notes alive.

[fol. 107] Conclusions of Law.

I.

The note here sued on is deemed prima facie to have been issued for a valuable consideration and the asserted defense of lack of consideration has not been proved to the satisfaction of the Court.

II.

Plaintiff is an innocent holder of the note in question in good faith and for value and the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved.

III.

Under the facts in this case defendant is estopped to assert want of consideration as a defense.

IV.

Plaintiff is entitled to recover of defendant the principal of said note, namely $5,000.00, together with interest thereon at the rate of six percent per annum from May 1st, 1933 and ten per cent additional on said principal and interest as Attorney's fees.

A formal judgment in accordance with the forgoing findings of fact and conclusions of law will be hereafter entered of record in this cause.

J. C. COLLET,
Judge.

Dated at St. Louis, Missouri, this 8th day of January, 1940.

[fol. 108] Decree.

(Filed Jan. 8, 1940)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. 3

D'Oench Duhme & Co., Inc., a corporation, Defendant.

This cause having come on for trial on the 20th day of November, 1939, evidence was adduced by the respective parties and the cause having been submitted on written briefs and the Court having heretofore filed in said cause its findings of fact and conclusions of law, and the Court having ordered that a decree be entered in accordance with said findings of fact and conclusions of law, it is therefore Ordered and Adjudged that plaintiff recover of defendant the principal amount of said note, viz.: Five Thousand Dollars ($5000.00) and interest thereon at the rate of six percent per annum from May 1, 1933 to date amounting to Seventeen Hundred and Five and 83/100 Dollars ($1705.83) and ten percent additional on said principal and interest as attorney's fees amounting to Six Hundred Seventy and 58/100 Dollars ($670.58), making a total judgment of Seven Thousand Three Hundred Seventy-six and 41/100 Dollars ($7,376.41) and costs.

J. C. COLLET,
Judge.

Dated this 8th day of January, 1940.

[fol. 109] Docket Entry Showing Motion of Defendant for a New Trial Filed.

January 20, 1940.

Motion of defendant for a new trial filed.

[fol. 110] Motion for New Trial

(Filed Jan. 20, 1940)

And now, to-wit: on this 18th day of January, 1940, the defendant, by its attorneys, John W. Giesecke and Harold C. Ackert, comes and moves the Court for a new trial and assigns the following reasons:

1. The finding and judgment was against the evidence.

2. The finding and judgment was against the law.

3. The learned Court erred in finding as a fact that demand was made in April, 1938, for payment of the note dated January 1, 1933, and the note at that time became due and was unpaid.

4. The learned Court erred in making the following conclusions of law, to-wit:

(a) That the asserted defense of no consideration has not been proved to the satisfaction of the Court.

(b) That the plaintiff is an innocent holder of the note sued on in good faith and for value and the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved.

(c) That under the facts the defendant is estopped to assert want of consideration as a defense.

5. The learned Court erred in not finding that the contract was a Missouri contract.

6. The learned Court erred in not finding that plaintiff was not a holder in due course of the note dated January 1, 1933.

[fol. 111] 7. The learned Court erred in not finding that plaintiff is the holder after maturity of the note sued on.

8. The learned Court erred in entering judgment for the plaintiff.

Wherefore, the defendant prays that the findings of fact and conclusions of law complained of herein be amended by striking the same out and that the court make new and additional findings of fact and conclusions of law as herein

prayed for and to grant the defendant a new trial herein or to enter a new judgment herein in favor of the defendant.

JOHN W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,

HAROLD C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Defendant.

Service of copy of within and foregoing Motion for New Trial received this 18th day of January, 1940.

CHESTER H. FARTHING and
WM. O'HERIN,
Attorney for Plaintiff.

[fol. 112] (Docket entry of overruling of Motion for New Trial.)

February 5, 1940.

Motion of defendant for a new trial argued, submitted and overruled.

[fol. 113] (Docket entry of filing of Additional Findings of Fact and Conclusions of Law.)

February 21, 1940.

Additional findings of fact and conclusions of law of Hon. J. C. Collet, received and filed.

[fol. 114] (Additional Findings of Fact and Conclusions of Law.)

(Received and Filed February 21, 1940.)

The following additional findings of fact and conclusions of law are made and given.

Additional Findings of Fact.

1a. On or about August 1, 1926 defendant executed two notes for a total of $5,000. These notes were signed at defendant's office in St. Louis, Missouri, were by their terms made payable at the defendant's office in St. Louis, Missouri, and were delivered to the payee at Belleville, Illinois. These notes constituted the obligation for which the note sued on is a renewal.

2a. The evidence does not disclose where the note sued on was actually signed.

7a. The consideration for the execution of the original note was the agreement to and the pledging of the bonds as security for the notes, the application of the proceeds of the sale of the bonds to the discharge of the notes, and the making of the forbearance agreements (defendant's exhibits A and B). One reason on the part of the defendant for the execution of the notes was the hope and expectation of the continuation of the business relationship existing between the defendant and the payee of the notes.

7b. The consideration for the execution of the note sued on was the surrender of the prior notes and the renewal and extension of the obligation of the prior notes.

Additional Conclusions of Law

1a. The note sued on constitutes a new contract between the parties.

1b. The rights of the parties under the note sued on are governed by the laws of the State of Illinois.

Dated this 19th day of February, 1940.

J. C. COLLET,
District Judge.

[fol. 115] Motion of Defendant to Extend Time for Filing the Record on Appeal and Docketing the Action in the United States Circuit Court of Appeals for the Eighth Circuit.

(Filed May 6, 1940)

Comes now D'Oench, Duhme & Co., Inc., defendant in the within and above entitled cause, by their attorneys, and

states to the Court that heretofore on or about the 6th day of April, 1940, the defendant herein did duly file in this Court its Notice of Appeal as contemplated in Rule 73 of the Federal Rules of Civil Procedure and did thus and thereby appeal the final adverse judgment of this Court against the defendant herein.

That defendants in preparing their record on appeal have been delayed through no fault of their own in getting said record completed because of delay in securing from the Stenographer the stenographic reports of the proceedings and evidence in said cause and that the attorneys for said defendant have been delayed in preparing said record due to the pressure of certain other matters requiring immediate attention and that defendants need additional time in which to prepare and file said record. That no prejudice or delay will result to any of the parties by virtue of granting of the order herein prayed for for the reason that the parties to said appeal have mutually agreed and stipulated that said cause may be heard before the United States Circuit Court of Appeals at the next sitting of said Court in the City of St. Louis, Missouri, and that even though this extension be granted, said record will be filed in ample time to be docketed at the next sitting of said United States [fol. 116] Circuit Court of Appeals in the City of St. Louis, Missouri.

Wherefore, defendant prays that an order may be entered extending the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Eighth Circuit for an additional period of fifty (50) days from the date when said record on appeal is required to be filed and said cause docketed, all as contemplated under Rule 73(g) of the Rules of Federal Procedure.

J. W. GIESECKE,
H. C. ACKERT,
Attorneys for Defendant (Appellant).

[fol. 117] (Order Extending Time to File Transcript.)

(Filed May 6, 1940.)

Now on this 6th day of May, 1940, the defendant herein, having duly presented to the Court its motion and appli-

cation for an order extending the time for filing the record on appeal and docketing said case in the United States Circuit Court of Appeals for the Eighth Circuit, and the Court having read and considered said motion and being duly advised in the premises, the Court Doth Order:

That the defendant be and it is hereby granted fifty (50) days additional time from the date otherwise required by law within which to file its record on appeal and docket the cause herein in the United States Circuit Court of Appeals for the Eighth Circuit.

J. C. COLLET,
Judge of the United States
District Court.

[fol. 118] Stipulation as to Record on Appeal.

(Filed June 26, 1940.)

In lieu of the designation of contents of the record on appeal as provided for in Rule 75(a) of the Rules of Civil Procedure and as contemplated by Rule 75(f), the parties to the appeal herein hereby enter into the within written stipulation designating the parts of the records, proceedings and evidence to be included in the record on appeal and the parties do hereby stipulate and designate:

The complete record and all the proceedings and evidence in the action, including a transcript of all the evidence and proceedings at the trial which was stenographically reported, two copies of such evidence and proceedings so stenographically reported to be filed with this stipulation by the appellant.

There shall be omitted from such complete record only the formal parts of all exhibits and the formal and irrelevant portions of any documents shall be omitted and only one copy of any document shall be included as contemplated in Rule 75(e).

J. W. GIESECKE,
H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants, D'Oench,
Duhme & Co., Inc.

CHESTER H. FARTHING,
WM. O'HERIN AND
LEAHY, WALTHER
HECKER & ELY,
Bank of Commerce Bldg.,
St. Louis, Missouri,
Attorneys for Federal Deposit Insurance Corp.

[fol. 119] (Stipulation for Omission of Certain Matters from Record on Appeal.)

(Filed June 26, 1940.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation,
Plaintiff,
No. 205. vs. Div. #3.
D'Oench, Duhme & Co., Inc., a corporation, Defendant.

The parties to the cause herein, in order to assist the Clerk of this Court in preparing the record on appeal to the Circuit Court of Appeals in conformity with the Rules of Civil Procedure and in order to assist said Clerk in abbreviating said record, and eliminating therefrom all matters not essential to the decision of the questions presented by the appeal, and to assist him in omitting formal parts of all exhibits and more than one copy of any document as well as to assist him in abbreviating documents by omitting therefrom all irrelevant and formal parts thereof, do hereby stipulate that the matters, things, and documents hereafter set out fall within one or the other of the classifications above referred to and should, therefore, be omitted by said Clerk in preparing the record on appeal.

Said matters, things, documents, etc. to be eliminated, omitted or abbreviated are as follows, to-wit:

1. All of that portion of Plaintiff's Exhibit 4 except the heading thereon and the account pertaining to D'Oench, Duhme & Co., Inc.

[fol. 120] 2. Plaintiff's Exhibits 2a, 2b, 2c and 2d, except caption first two paragraphs and clauses one (1) and four (4) appearing upon 2a and execution including signatures appearing on 2d.

3. Plaintiff's Exhibit 3

4. Plaintiff's Exhibit 5

5. Plaintiff's exhibits 6 and 7 (as the same are identical with exhibits attached to Defendants answer) and Defendant's Exhibits A and B may be omitted as separate parts of the record inasmuch as the same are fully set out on pages 33 and 34 respectively of the transcript of the testimony and Defendants exhibits C and D the same being identical with Plaintiff's exhibits 6 and 7 and with exhibits attached to Defendants answer.

6. The following specific minute entries in the Clerk's Office, to-wit:

a. Entry under date of April 22, 1939 (showing issuance of summons)

b. Entry under date of April 26, 1939 (showing Marshal's return)

c. Entry under date of June 22, 1939 (showing Plaintiff's Petition for Leave to Amend and Notice in connection therewith)

d. Entry under date of July 5, 1939 (showing amendment granted) (In lieu of the minute entries above set out under "c" and "d" the Clerk will simply show in the record the amended Petition, if feasible, otherwise these entries may be included.)

[fol. 121] e. Entry under date of July 18, 1939 (relative to setting of case)

f. Entry under date of October 10, 1939 (praecipe re depositions)

g. Entry under date of October 17, 1939 (re setting of case)

h. Entry under date of November 28, 1939 (re filing of transcript of testimony)

i. Entry under date of November 30, 1939 (order re filing briefs)

j. Entry under date of December 22, 1939 (re filing of depositions)

k. Entry under date of January 27, 1940 (re notice to docket motion for new trial)

7. Depositions filed in cause.

The parties by the execution of this stipulation agree that on appeal no challenge will be made by either of them with respect to sufficiency of proof on any of the above formal matters which would otherwise require production of the omitted exhibits or minute entries.

J. W. GIESECKE &
H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants, D'Oench, Duhme & Co., Inc.

CHESTER H. FARTHING,
WILLIAM O'HERIN AND
LEAHY, WALTHER &
HECKER,
Bank of Commerce Bldg.,
St. Louis, Missouri,
Attorneys for Federal Deposit Insurance Corp.

[fol. 122] Clerk's Certificate.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the stipulation of the contents of the record on appeal heretofore set out) of the record and proceedings in case No.

205, wherein, Federal Deposit Insurance Corporation, a corporation is plaintiff and D'Oench, Duhme and Company, Inc., a corporation, is defendant, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District this 5th day of July, in the year of our Lord, Nineteen Hundred and forty.

(Seal)
U. S. Dist. Court
East. Jud. Dist.
of Mo.
East. Div.

JAMES J. O'CONNOR,
Clerk of said Court.
By C. E. Rudolph,
Deputy Clerk.

Filed Jul. 5, 1940. E. E. Koch, Clerk.

[fol. 123] Statement of Errors and Points Relied Upon.

In The United States Circuit Court of Appeals for the Eighth Circuit.

Federal Deposit Insurance Corporation, a corporation,
Appellee,
No. 11779. vs.
D'Oench, Duhme & Co., Inc., a corporation, Appellant.

Comes now D'Oench, Duhme & Co., Inc. appellant herein, by its attorneys of record, and pursuant to the requirement of Rule 24 of this Court does hereby submit a statement of points to be relied upon by appellant as contemplated by Section 75(d) of the Federal Rules of Civil Procedure and Rule 24 of this Court and do hereby set out separately and particularly each error asserted which appellant intends to urge on this appeal. Said points and statement of errors are as follows, to-wit:

1. The Court erred in permitting the plaintiff to file its Reply containing therein an allegation and claim of estoppel against the defense asserted by the defendant in its

Answer and in so permitting plaintiff to file said Reply the Court did abuse its discretion.

2. The Court erred in overruling defendant's oral motion to strike plaintiff's Reply for the reason that said Reply did not allege any facts constituting a defense to the new matter set out in defendant's Answer.

3. The Court erred in making its additional finding of fact No. 1-a and in finding as a fact that the original notes involved in the transaction herein were delivered to the payee in Belleville, Illinois, in that there was insufficient evidence to support said finding of fact.

[fol. 124] 4. The Court erred in finding as a fact as part of its finding of facts No. 7 that the defendant "pledged as security" for the original notes the $2000 Kentawka Drainage District bonds and the $3000 Beaver Dam Drainage District bonds mentioned in the evidence in that said finding is unsupported by the evidence.

5. The Court erred in finding as a fact under the Court's finding No. 12 that the defendant "pledged as collateral" for the note sued on "the same bonds which were pledged as security for the original notes dated August 1, 1926" in that said finding is unsupported by the evidence.

6. The Court erred in making its finding of fact No. 7-a and in finding as a fact that any consideration passed from the Belleville Bank to the defendant for the original notes in, that there was no evidence to support such finding of fact.

7. The Court erred in finding as a fact under its finding 7-a that the forbearance agreements (defendant's Exhibits A and B) constituted consideration for the original notes for the reason that said forbearance agreements do not as a matter of law constitute consideration.

8. The Court erred in its finding 7-a in finding as a fact that defendant executed the original notes in the hope and expectation of continued business and that such hope and expectation of continued business constituted consideration for the issuance of the said original notes in that there was no evidence to support such a finding of fact and even if such fact existed the same would not constitute consideration as a matter of law.

9. The Court erred in making its finding of fact No. 7-b and in finding as a fact that "the consideration for the execution of the note sued on was the surrender of prior notes and the renewal and extension of the prior obligation", in that the surrender of an accommodation note does not as a matter of law constitute consideration for a renewal note.

[fol. 125] 10. The Court erred in making its finding of fact No. 9 and in finding as a fact that the plaintiff had no knowledge of the forbearance agreements until after plaintiff had demanded payment of the note sued on from the defendant in August, 1938, in that plaintiff is not a holder in due course and is, therefore, charged with constructive knowledge thereof.

11. The Court erred in making its finding of fact No. 10 and in finding as a fact that "at the time of the execution of these notes it was agreed that when the bonds pledged as collateral thereto would be paid, then that payment would be credited against the above notes that defendant company gave the bank" in that said finding is unsupported by the evidence.

12. The Court erred in making that part of its finding of fact No. 16 which states that "plaintiff had no notice of any contention that defendant's note was given without consideration until after it had demanded payment of defendant in August, 1938", in that plaintiff was as a matter of law charged with constructive notice of such contention.

13. The Court erred in its conclusion of law I wherein it held that "The asserted defense of lack of consideration has not been proved to the satisfaction of the Court" in that such conclusion is unsupported by and contrary to the evidence and for the further reason that said conclusion is based upon the erroneous proposition that the burden of proving lack of consideration is upon the defendant.

14. The Court erred in failing to rule that the burden of proof on the issue of consideration was upon the plaintiff and that the plaintiff had failed under the evidence to establish such burden of proof by the greater weight of the evidence.

15. The Court erred in not holding and ruling that the defense of no consideration asserted by the defendant had been fully sustained and proven under the law and the evidence.

16. The Court erred in its additional conclusions of law No. 1-a holding and ruling that the note sued on constituted a new contract between the parties in that the note sued upon was a mere renewal of the original notes and as a [fol. 126] matter of law stood upon the same footing and basis as the original notes entitling the defendant to assert the same defenses as would have been available on the original notes including the defense of no consideration.

17. The Court erred in its additional conclusion of law No. 1-b ruling and holding that the rights of the parties under the notes sued on are controlled by the laws of the State of Illinois in that the rights of the parties under the note sued on are governed by the laws of the State of Missouri either on the ground that the note sued on is a Missouri contract or upon the ground that even though the note sued on be an Illinois contract yet inasmuch as the plaintiff has invoked the jurisdiction of the District Court sitting in Missouri, the plaintiff is bound by the rules of law applicable in Missouri including the right of defendant to assert the defense of no consideration under the facts of this case.

18. The Court erred in making its conclusion of law II and in holding and ruling that the plaintiff is an innocent holder in good faith and for value and that the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved in that even if plaintiff was an innocent holder in good faith and for value the Court has failed to find that the plaintiff was a holder "in due course" and unless the plaintiff is a holder in due course the defense of no consideration can be maintained.

19. The Court erred in not holding that the plaintiff as a matter of law was not a holder in due course of the note sued on and that said note was subject to all defenses existing between the original parties for the reason that as a matter of law said note was past due when acquired by plaintiff.

20. The Court erred in failing to hold as a matter of law that the note sued on was past due when acquired by the plaintiff and that the plaintiff was not a holder in due course and was not entitled under the facts and law of this case to recover.

[fol. 127] 21. The Court erred in its conclusion of law III holding that "under the facts of this case defendant is estopped to assert want of consideration as a defense" in that under the facts and law of this case want or lack of consideration is a complete defense and plaintiff is not estopped from asserting said defense.

22. The Court erred in making and entering a judgment in favor of the plaintiff and against the defendant.

HAROLD C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.

J. W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.
Attorneys for Appellants.

(Endorsed: No. 11,779. Statement of Errors and Points relied upon.

Filed in U. S. Circuit Court of Appeals on July 10, 1940.

[fol. 86] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

D'Oench, Duhme & Company, Inc., Appellant,
No. 11,779. vs.
Federal Deposit Insurance Corporation.

The Clerk will enter my appearance as Counsel for the Appellant.

J. W. GIESECKE,
H. C. ACKERT,
706 Chestnut, St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 5, 1940.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

WM. O'HERIN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 18, 1940.

[fol. 87] (Order of Submission.)

November Term, 1940.

Thursday, November 21, 1940.

This cause having been called for hearing in its regular order, the same was argued by Mr. John W. Giesecke and Mr. Harold C. Ackert for appellant, and counsel for appellee not appearing to present oral argument, this cause is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 88] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,779.—November Term, A. D. 1940.

D'Oench, Duhme & Co., Inc., a corporation,
Appellant,
vs.
Federal Deposit Insurance Corporation, a corporation,
Appellee.

Appeal from the District Court of the United States for Eastern District of Missouri.

[February 11, 1941.]

Mr. John W. Giesecke and Mr. Harold C. Ackert for Appellant.

Mr. Chester H. Farthing, Mr. Wm. O'Herin and Messrs. Leahy, Walther and Hecker filed brief for Appellee.

Before Gardner, Woodrough and Johnsen, Circuit Judges.

Johnsen, Circuit Judge, delivered the opinion of the Court.

Two questions are determinative of this appeal: (1) Whether the promissory note involved is governed by the law of Illinois or of Missouri; and (2) whether, under the law of the applicable state, the indorsee of a demand note, given for the accommodation of the payee and negotiated more than five years after its execution, may have the status of a holder in due course.

Plaintiff (appellee) has a corporate existence under 12 U.S.C.A. §264 (Act of June 16, 1933, c. 89, §8, as amended). Defendant (appellant) is a Missouri corporation.

The action was one upon a promissory note, which defendant had executed as maker, in favor of Belleville Bank & Trust Co., as payee, and of which plaintiff claimed to be a holder in due course. The instrument was in the face amount of $5,000, was dated Belleville, Illinois, January 1, 1933, and was payable on demand, with interest semi-annually, at the office of the payee, in Belleville, Illinois. It was indorsed by the payee to plaintiff, at Belleville, Illinois, on April 4, 1938, as collateral, with other assets, for a loan made by plaintiff, under 12 U.S.C.A. §264 (n) (4), to facilitate a transfer of the deposit liabilities of Belleville Bank & Trust Co. and their assumption by another bank. By the terms of the loan transaction, plaintiff was authorized to make collection of the collateral in its own name, on any default in the payment of the principal obligation.

After such a default by Belleville Bank & Trust Co., plaintiff made demand upon defendant for payment of its note, and then instituted this action. Suit was brought in federal court under the provisions of 12 U.S.C.A. §264 (j) Fourth, and 28 U.S.C.A. §42. The case was tried without a jury. The trial court held that the note was governed by the law of Illinois, and that, under the law of that state, plaintiff had the status of a holder in due course. Judgment was rendered in favor of plaintiff, and defendant has appealed.

From the evidence, it appeared that defendant was a dealer in securities, and that Belleville Bank & Trust Co. had been one of its customers. In 1926, some Arkansas and Mississippi drainage district bonds, which defendant had sold the bank, went into default, and, to prevent their showing as delinquent assets on its records, the cashier requested defendant, as an accommodation, to execute two demand notes in favor of the bank, in an amount equal to the face of the bonds, to which the securities were to be

carried as purported collateral. The bank gave defendant receipts for the notes, which recited, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." Subsequent renewals of the notes were executed. Defendant made interest payments to the bank until 1932, which were retained by the bank, though it appears that some years later and before the note here involved was negotiated, defendant requested that these sums be returned. The original notes were executed at St. Louis and contained a recital that they were negotiable and payable at the office of defendant in that city. The contents of the intermediate renewal notes are not shown. The note here involved consolidated the amounts of the original notes and, as previously indicated, was dated Belleville, Illinois, and was made payable at the office of the Belleville Bank & Trust Co. in that city. Since 1935, the bank had carried the note as a charged-off asset.

Defendant contends that the original notes were Missouri contracts, and that all renewals should therefore be held to be governed by the law of that state. But an accommodation note, like any written instrument, is subject to competent modification. And where, on a renewal of accommodation paper, its terms and recitations are so changed as to make applicable other or different principles of law, their effect cannot be escaped by mere inferences from the original paper. An instrument that is complete, unambiguous and unimpeached must be governed by its own applicable law.

Where a negotiable instrument is executed and is payable in the same state, and there are no other controlling provisions in it, it elementarily must be held to be governed by the law of that state. A contract is regarded as having been executed where the last act necessary to make it a legal obligation has been and, under the terms of the instrument, was entitled to be done. *Hogue-Kellogg Co.* v. *G. L. Webster Canning Co.*, 22 F.2d 384 (C.C.A.4); 1 Williston on Contracts, Rev. Ed., 309, §97. In the case of accommodation paper, this is the place where it has been,

and where the parties must be held to have intended it could be, negotiated for value to a third person. *Tilden* v. *Blair*, 88 U.S. (21 Wall.) 241, 22 L. Ed. 632; *Gay* v. *Rainey*, 89 Ill. 221, 31 Am. Rep. 76; Restatement Conflict of Laws, §320; 2 Beale Conflict of Laws 1059, §320.1; 7 Am. Jur. 808, §34.

Here, the original notes were issued at St. Louis, Missouri, and contained a recital that they were negotiable and payable there. The renewal note involved in this action, however, was dated and made payable at Belleville, Illinois. It contained no provision indicating that it was not intended to be negotiated there. From the face of the instrument, it was properly in the hands of the payee in that state. In this situation, if the instrument was legally subject to negotiation, a transferee necessarily was entitled to assume and claim that the resulting contract between the maker and himself was an Illinois contract and would be governed by the law of that state.

The remaining question then is whether, under the law of Illinois, plaintiff is a holder in due course or has a status equivalent thereto.

Section 52 of the Uniform Negotiable Instruments Law provides that a holder in due course is one who, among other things, has taken the instrument before it was overdue. Section 53 provides that, "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 29 provides that an accommodation party "is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." These provisions are in force in Illinois (Smith-Hurd Ill. Ann. St., Perm. Ed., c. 98, §§72, 73, 49) under the Negotiable Instruments Law of that state, with a clause added by the legislature to Section 29 providing, "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

Defendant contends that five years ought to be held to be an unreasonable time for the negotiation of a demand note, as a matter of law; that it was in any event an unreasonable period under the facts of this case; that plaintiff must therefore be held to have taken the instrument after maturity; and that the paper was accordingly subject to all the defenses existing between the original parties.

Whether five years is an unreasonable length of time to negotiate a demand note, or whether it was an unreasonable period under the facts of this case, it is unnecessary to decide. The courts of Illinois appear to have taken the view that, notwithstanding the provisions of the Negotiable Instruments Law and the clause added to section 29 by the Illinois legislature, one to whom accommodation paper is negotiated, in good faith and for value, is in the position of, or equivalent to, a holder in due course, whether he acquires title before or after maturity. This construction necessarily is binding on us.

In the early case of *Miller* v. *Larned*, 103 Ill. 562 (1882), the Supreme Court of Illinois declared: "It is a reasonable rule that one who puts his note or bill in the hands of another to be sold or negotiated, after it is done, will not be permitted to answer the holder, who has taken it in good faith for value, that he does not owe the bill. The very purpose of making accommodation paper is, that the party favored may dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound."

In *Naef* v. *Potter*, 226 Ill. 628, 80 N.E. 1084, 11 L.R.A. (N.S.) 1034, (1907), the court extended the rule, to protect a holder after maturity where accommodation paper had been diverted from its agreed purpose. It was there held: "A transferee of accommodation paper, in good faith and for value, even after maturity and with notice that it is accommodation paper, is entitled to recover notwithstanding it has been diverted from its purpose, where there are no restrictions as to its use written into the paper and no notice of such restrictions brought to the knowledge of

the transferee." The opinion adds: "But it is said appellee accepted the note and trust deed after maturity, and the rule applicable generally to commercial paper is invoked, that the transferee of past due negotiable paper takes it subject to all defenses that might have been interposed against the original holder. This rule does not apply to accommodation paper. If it did apply to such paper the effect would be to destroy the value of all accommodation paper when the same is transferred after maturity. * * * But the law in this State * * * is, that the transferee of accommodation paper, even after maturity and with notice that it is accommodation paper, takes it discharged of all defenses that might have existed against the accommodated party."

These two cases were decided before the Negotiable Instruments Law had been adopted and become operative in Illinois. Ordinarily in this situation they would perhaps not have controlling significance; but, even since the Negotiable Instruments Law became effective there in 1907, the courts have recognized these previous decisions as declaring the existing law of the state. Thus, in *Elgin National Bank* v. *Goecke*, 213 Ill. App. 559 (1919) it was said: "Under sections 29, 63, 64, Negotiable Instruments Act * * * defining the rights and liabilities of accommodation indorsers, lack of consideration for the indorsement is no defense even against a purchaser after maturity with notice." In that case it was claimed that the notes had been diverted from the restricted use for which they were issued, and, while they seemingly had been negotiated before maturity, the opinion declares: "As they did not write such restrictions into the instruments, nor bring them to the attention of the bank at or before the time when the paper passed to it, such special purpose does not constitute a defense, even if the bank took the paper when it was past due."

Again, in *Foreman Trust & Savings Bank* v. *Cohn*, 342 Ill. 280, 174 N.E. 419 (1930), the court after setting out section 29 of the Negotiable Instruments Law in its opinion, with the addition made thereto by the Illinois legislature, that, where a transfer of accommodation paper after maturity was intended, there should be a liability

notwithstanding the holder acquired title after maturity, recognized the rule laid down in *Naef* v. *Potter, supra,* as follows: "In *Naef* v. *Potter* * * * it was held that a transferee of accommodation paper in good faith and for value, even after maturity and with notice that it is accommodation paper, is entitled to recover, notwithstanding it has been diverted from its purpose, where there are no restrictions as to its use written into the paper and no notice of such restrictions brought to the knowledge of the transferee."

In *Corrigan* v. *Harris,* 207 Ill., App. 291 (1917) which is not fully reported, the court appears to have applied a different rule, without any reference to *Naef* v. *Potter.* In *Wilhoit* v. *Searall,* 121 Kan. 239, 246 Pac. 1013, 48 A.L.R. 1273, the Supreme Court of Kansas asserts that the rule of *Naef* v. *Potter* ought not to be regarded as the law in Illinois under the Negotiable Instruments Law. But, no matter how illogical or ill-considered it may be contended that the expressions in *Elgin National Bank* v. *Goecke, supra,* and *Foreman Trust & Savings Bank* v. *Cohn, supra,* are, in their application to the provisions of the Negotiable Instruments Law, they clearly indicate that the courts of Illinois regard the rule in *Naef* v. *Potter* as still the governing law of that state. For the purposes of this case, and until its authorized tribunals declare otherwise, we must accept it as the established law of Illinois that, under its Negotiable Instruments Law, a transferee of accommodation paper in good faith and for value has a status equivalent to that of a holder in due course, whether he takes the paper before or after maturity. It may be added that, while the construction of the Negotiable Instruments Law made by the Illinois courts represents a minority American viewpoint, it has at least some support in other jurisdictions. 8 Am. Jur. 170, §426; 48 A.L.R. 1280, annotation.

While there is no evidence in the record from which it could be inferred that plaintiff had actual knowledge of the accommodation character of the paper, that question would in any event not be material under the applicable law. No issue has been raised as to the formal sufficiency of the paper as a negotiable instrument, and hence that

question also calls for no consideration. The ground of disposition here also makes unnecessary a discussion of defendant's other contentions, except to remark that the mere fact that the paper had been charged off by the bank was not notice of any infirmity in the instrument or defect in the bank's title within the meaning of sections 52(4) and 56 of the Negotiable Instruments Law. The charging off of commercial paper by a bank does not necessarily imply an infirmity in the instrument or a defect in the bank's title, and, without other circumstances, is not knowledge of such facts that the transferee's action in taking the instrument amounts to bad faith under the Negotiable Instruments Law.

Affirmed.

[fol. 97] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1940.

Tuesday, February 11, 1941.

D'Oench, Duhme and Co., Inc., a Corporation, Appellant,
No. 11,779. vs.
Federal Deposit Insurance Corporation, a corporation.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Federal Deposit Insurance Corporation, a corporation, have and recover against D'Oench, Duhme and Co., Inc., a corporation, the sum of Twenty Dollars for its costs herein and have execution therefor.

February 11, 1941.

IN THE

United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

D'OENCH, DUHME & CO., INC., a Corporation,
Appellant,
vs.
FEDERAL DEPOSIT INSURANCE CORPORATION, a Corporation,
Appellee.
No. 11,779.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLANT'S PETITION FOR REHEARING.

Comes now D'Oench, Duhme & Co., Inc., a corporation, appellant herein, and duly moves the Court to set aside its opinion and judgment herein rendered under date of February 11, 1941, and to grant said appellant a rehearing in the cause herein.

As and for its ground for this petition, appellant respectfully calls the Court's attention to the following material matter of law inadvertently overlooked by the Court as shown by its opinion in this cause:

The Court, by applying the law of the State of Illinois as determinative of this case and in ascertaining that law solely by reference to decisions of the Illinois courts, has overlooked and failed to apply points urged by the appellant, namely, that inasmuch as the appellee neither pleaded nor proved the law of Illinois that such law, even if otherwise applicable (as the Court in its opinion has found) will

be presumed to be the same as the law of Missouri and that the Missouri law as enunciated in the Missouri decisions should control and determine this case for the further reason that the Illinois law is repugnant to the settled public policy of the forum state. This was clearly relied on by appellant in its original brief filed herein. (See Points Relied Upon, Nos. 19 and 20, page 12, of Appellant's Brief; Points and Authorities V, B and C, pages 18-19; and Argument V, B and C, pages 42 to 46.)

The Court, although not alluding to or specifically ruling the point raised by appellants, namely, that federal courts will no longer take judicial notice of the laws of all states but will apply the law of the state of the forum to determine whether or not a foreign law will be judicially noticed or whether it must be pleaded and proven in order to be considered, has, nevertheless, ruled this contention squarely against the appellant by in fact taking judicial notice of the Illinois decisions and in failing to apply the Missouri decisions. This Court has thus violated the rule of **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188** (cited and discussed in appellant's original brief, page 45) and the spirit of that decision as interpreted by the First Circuit in **Sampson v. Channell, 110 F. (2d) 754, 128 A. L. R. 394, 405** (cited by the appellant at the oral argument on this cause), and **is in direct conflict on the specific point here involved** with the decisions of the Third Circuit in the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.**, and **Warfield v. General Finance Co. of Philadelphia, Pa., Inc., 116 F. (2d) 254, l. c. 257.** These last-cited cases, which are on "all fours" with the case at bar and are in direct conflict therewith, were actually decided November 27, 1940, only a few days after the submission of the cause herein. The decisions, however, were unknown to counsel for the appellant until after receipt of the Federal Reporter, dated February 3, 1941, wherein they were first reported. This

issue of the Federal Reporter was received just a few days before the rendering of the opinion herein and were discovered by counsel almost simultaneously with the entry of the opinion herein. The decisions undoubtedly were likewise not available to the Court when the opinion herein was prepared.

The decision and opinion in the case at bar, in applying the law of Illinois when the case was tried in the District Court of Missouri and when the law of Illinois was neither pleaded nor proved, is in direct conflict with the cases last cited, wherein it was held, at page 257:

> "As the accident which inflicted the plaintiff's injuries occurred in Maryland, the law of that state would, under well-settled principles, ordinarily determine the legal incidents of the case. Restatement of the Law, Conflict of Laws, paragraphs 278 and 279. But no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487,** it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See Goodrich, Conflict of Laws (2d Ed.), para. 12. Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

In appellant's original brief it was pointed out that the pertinent rule of law in Missouri is the same as in Pennsylvania, namely, that in the absence of evidence to the contrary the law of another state will be presumed to be the same as the law of Missouri. A number of cases in support of this rule were cited in the original brief, including

Kinsley Bank v. Woods, 61 S. W. (2d) 384 (Mo. A.); Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591, 599; Madden v. Railroad, 192 S. W. 455, 456 (Mo. Sup.); Gordan v. Andrews, 2 S. W. (2d) 809 (Mo. A.). We then argued, based on the foregoing Missouri presumption (original Brief page 45):

> "It is, of course, the clear duty of the Federal Court to follow the Missouri decisions. **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188; Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. ed. 1290.** This includes the application of the Missouri presumption, absent pleading and proof, that the law of Illinois is the same as the law of Missouri."

Wherefore, petitioner prays that the Court will set aside its opinion heretofore rendered and grant said petitioner a rehearing in the cause herein.

Respectfully submitted,

JOHN W. GIESECKE,
HAROLD C. ACKERT,
706 Chestnut St.,
St. Louis, Mo.,
Attorneys for Appellant.

Certificate of Counsel.

John W. Giesecke and Harold C. Ackert, counsel for the appellant in the within and foregoing cause, hereby certify that the foregoing petition for rehearing is filed in good faith and that said counsel believe the same to be meritorious and that said petition is not filed for vexation or delay.

John W. Giesecke,
Harold C. Ackert,
706 Chestnut St.,
St. Louis, Mo.,
Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 21, 1941.

[fol. 102] (Order Denying Petition of Appellant for a Rehearing.)

March Term, 1941.

Thursday, March 27, 1941.

The petition for rehearing of this cause filed by counsel for the appellant having been considered by this Court, It is now here Ordered that the same be, and is hereby, denied.

March 27, 1941.

[fol. 103] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein D'Oench, Duhme & Co., Inc., a Corporation, was Appellant, and the Federal Deposit Insurance Corporation, a Corporation, was Appellee, No. 11,779, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the tenth day of April, A. D. 1941, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of June, A. D. 1941.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7561)